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VERMONT REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF VERMONT.

BY

EDWIN F. PALMER.

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JUDGES  
OF THE  
SUPREME COURT,  
DURING THE TIME OF THESE REPORTS.

HON. HOMER E. ROYCE, CHIEF JUDGE.

HON. JONATHAN ROSS,  
HON. H. HENRY POWERS,  
HON. WHEELOCK G. VEAZEY,  
HON. RUSSELL S. TAFT,  
HON. JOHN W. ROWELL,  
\*HON. WILLIAM H. WALKER,  
\*HON. JAMES M. TYLER,

ASSISTANT JUDGES.

\* Judge Tyler was appointed by the Governor, September 16, 1887, to fill a vacancy caused by the resignation of Judge Walker.



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Charles Dewey, Inspector of Finance, v. The St. Albans Trust Co.

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GENERAL TERM 1887.

Present: ROYCE, Ch. J., ROSS, POWERS, VEAZEY, TAFT,  
ROWELL and TYLER, JJ.

CHARLES DEWEY, INSPECTOR OF FINANCE, v. THE ST.  
ALBANS TRUST CO.

[IN CHANCERY.]

*Trust Company, Dissolution of. Surrender of Corporate  
Rights. Parties. Receiver. R. L. ss. 773, 3556.*

1. The inspector of finance obtained an injunction against an insolvent trust company, restraining it from transacting further business, and also the appointment of a receiver, who was ordered to take possession of the property and administer it according to law. The receiver preferred his petition, praying for the direction of the court as to the distribution of the funds, with reference to one section of the charter, which gave a preference to the debts of minors, insane persons, and married women, in "case of the dissolution of said company by act of law or otherwise." There were more than 2400 depositor, and more than 1100 claimed a preference. Notice of the hearing on the petition was given by publication three weeks successively in a newspaper, and by acceptance of service by the chairman of the depositors' committee. The receiver and counsel for the general creditors, and also counsel for those who claimed a preference, appeared; and after a full hearing it was decreed that there should be an equal distribution of the funds, on the ground that insolvency did not work a dissolution of the corporation. An appeal was taken on behalf of eight married women and four minors, some of whom intervene in this proceeding; and the decree below was affirmed. On a petition brought a little more than a year after the first one, for the purpose of obtaining a preference;—*Held*,
2. That, although the general rule is that all persons interested in the litigation should be before the court, this case is within the exception that, where the parties are so numerous as to make it impracticable or greatly inconvenient and expensive, it is sufficient, if such number be joined as will fairly represent the interest of all; and that, as both classes of depositors were fairly represented in the litigation, all of them were bound by the decree.

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- 3 That, as the doctrine of estoppel by judgment is not applicable to a case ambulatory in its nature, the decree does not preclude all future inquiry into the matter; but, in determining whether a dissolution is now shown, the inquiry must be confined to what transpired at a time between the institution of the two proceedings. Relief cannot be granted on what existed before the first decree; and it is not sufficient to show a present state of things adequate to relief.
- 4 That most of the things alleged in the petition are found by the master to exist at the present time; but it does not appear when those things transpired, except the depreciation of assets, which was large during the last two years; but this does not entitle the petitioners to be heard on the merits; for insolvency, however hopeless, is not sufficient evidence of the surrender of corporate rights.
- 5 The Supreme Court will look into the whole record of the former adjudication in this case, to see what has been done; and, having been set up in the answer, it is available, though not put in evidence; especially as the petition expressly made the prior proceedings a part of itself, but omitted to set them out, to avoid prolixity.
- 6 The receiver, in point of fact, represented in court the general creditors, rather than those claiming a preference.

IN CHANCERY. Petition of certain depositors of the St. Albans Trust Company, to obtain an order of preference. Heard on the pleadings and the report of a special master, September Term, 1886, Franklin County. ROYCE, Chancellor. Decree that the petition be dismissed. Affirmed.

The master found "that the present financial condition of the trust company is that of hopeless insolvency;" that its embarrassment "is not temporary but permanent;" that none of the stockholders or officers "intend to repair the impairment of the capital stock or to resume the business of the company;" that the "trust company has not attempted to perform any of the functions of a corporation since the appointment of a receiver;" that the company "has become inert, and has at present a mere nominal existence," and from lack of funds is "incapable of performing its functions."

"It appeared that during the last two years, and since the appointment of a receiver, the value of the assets has steadily depreciated below the estimates of that time. In November, 1883, the personal property alone, connected with the Norwood Lumber Company property, was valued at \$126,328.78, and

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the real estate at \$206,501.50,—much greater than its present estimated value; \* \* \* that the receiver's present estimate of the value of what remains of the Norwood Lumber Company property (the personal property having been sold, except \$20,000 worth) is but \$125,000; in order to get the title to the property the receiver had to surrender \$129,000 of its paper."

*Farrington & Post* and *A. G. Safford*, for the petitioners.

Dissolution means a loss of corporate existence, and takes place when there is such a suspension of the company's power to do business as to render it incapable of fulfilling the purpose of its creation and existence.

Plainly, the word as used in the bank charter was intended to mean, either the loss of existence, or the loss of ability and power to act, by reason of its condition. If the former, then no preference can be obtained until these petitioners secure the dissolution by judicial determination; and the legislature clearly did not intent this. If it did, § 17 of the charter is hardly available,—the machinery is so cumbrous.

Rev. Laws, chap. 72; *Green v. St. Albans T. Co.* 57 Vt. 340.

There is a fundamental distinction between the dissolution of a corporation and the loss of its franchise or legal right to exist. 2 Morawetz, Priv. Corp. ss. 1002, 1004, 1011, 1040.

And the phrase "dissolving a corporation" is used sometimes as synonymous with annulling a charter or terminating its existence, and sometimes as meaning merely a judicial act which alienates the property and suspends the business of the corporation, without terminating its existence. *Re Independent Ins. Co.* 1 Holmes, 103.

As relates to creditors, "any inability of the company, by reason of a total want of funds, to exercise its functions, will be deemed a dissolution." Ang. & A. Corp. 613; *Slee v. Bloom*, 19 Johns. 456; *Penniman v. Briggs*, Hopk. 300; *S. C.* 8 Cow. 387; *Verplanck v. Mercantile Ins. Co.* 2 Paige,

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452; *Bank Cmr. v. Bank of Buffalo*, 6 Paige, 503; *Bruce v. Platt*, 80 N. Y. 379, 386, and cases cited; 2 Kent, Com. 310, 311; *Folger v. Columbian Ins. Co.* 99 Mass. 267; *Re Independent Ins. Co. supra*; *Central Ag. & Mech. Asso. v. Alabama Gold Life Ins. Co.* 70 Ala. 120; See Ala. Rev. Code s. 1760; *Smith v. Huckabee*, 53 Ala. 191; *Perry v. Turner*, 55 Mo. 418; *State Sav. Asso. v. Kellogg*, 52 Mo. 583; Mo. Gen. Stat. 1865, p. 330, s. 20; 2 N. Y. Rev. Laws, 6th ed. p. 496, s. 7; Act 1811, p. 506, s. 47; 3 N. Y. Rev. Laws, 6th ed. p. 748, s. 50; Thomp. Liab. Stockh. s. 310, note 4; 2 Morawetz Priv. Corp. s. 1002.

It is held in *State Sav. Asso. v. Kellogg*, 52 Mo. 583, that an adjudication of bankruptcy against a corporation amounts to a dissolution, so that a suit can be maintained under the statute which provides an action against a stockholder for debts unpaid at the time of dissolution. Mo. Gen. Stat. 1867, p. 330, s. 20; 1 W. S. 393, s. 22.

In a remedial statute, the court will carry into effect the clear intention of the legislature, making the words yield to the spirit. *Henry v. Stilson*, 17 Vt. 479.

A thing within the intention is within the statute, though not within the letter. Potter's Dwarr. Stat.

The defendants, under the pleadings and evidence, cannot rely upon a former adjudication. Rob. Dig. p. 134, s. 101; *Simpson v. Hart*, 14 Johns. 63.

The records should have been put in evidence. To sustain the estoppel because of a former adjudication, it must appear that the former case was between the same parties; and that the precise question was passed upon; and the burden of proof is upon the defendant. *Pelton v. Mott*, 11 Vt. 148; *Aiken v. Peck*, 22 Vt. 255; *Continental L. Ins. Co. v. Currier*, 58 Vt. 229.

The objection that a defence might have been made in a former action must be limited as applicable to such matters only as might have been used as a defence in that action against

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an adverse claim therein,—such matter as, if considered in a subsequent action, would involve an inquiry into the merits of the former judgment. 49 N. Y. 111; *Jordan v. Van Epps*, 85 N. Y. 427; *Bray v. Hegeman*, 98 N. Y. 351; *Malloney v. Horan*, 49 N. Y. 111–116; *Clemens v. Clemens*, 37 N. Y. 59; *Bruen v. Hone*, 2 Barb. 586–596; *Burwell v. Knight*, 51 Barb. 267; *Cromwell v. Sac. County*, 94 U. S. 351 (24 L. ed. 195); *Washington, A. & G. S. P. Co. v. Sickles*, 72 U. S. 5 Wall. 580 (18 L. ed. 550); *Griffin v. Long Island R. Co.* 3 Cent. Rep. 740, 102 N. Y. 449; 25 N. Y. 613; 5 Gray, 316.

*Hard & Cushman and Stephen E. Royce* for the defendants.

A receiver “is equally the representative of all parties in his capacity as an officer of the court.” High, Receivers, s. 175.

In all chancery proceedings when a large number of persons have a common interest, it is common practice to make only a part of them parties; and when no collusion is suspected this is treated as sufficient. Parties “in the larger legal sense, are all persons having a right to control the proceeding, to make defence, to advance and cross-examine witnesses, and to appeal from the decision if an appeal lies” (1 Greenl. Ev. s. 535); “and, it may be added, those who assumed such a right” (Bigelow, Estop. 59).

An adjudication is final and conclusive, not only as to the matter actually determined, but as to every other matter which the parties might have litigated and have had decided as incident to or essentially connected with the subject-matter, coming within the legitimate purview of the original action both in respect to matters of claim and of defence. Freem. Judg. s. 249 and note.

The discovery of new evidence not in the power of the party at the former trial forms no exception as to an estoppel. Id.

The former adjudication is conclusive, though the case was improperly managed, and the court misapplied the law. Freem. Judg. s. 260.

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The receiver was subject to the orders of the court of chancery, and not only had a right to apply to the court for direction in all doubtful matters, but was in duty bound to do so.

High, Receivers, ss. 177, 188; Rev. Laws, s. 3548.

The receiver, under the direction of the court, has distributed a large amount *pro rata* among the depositors; and it is too late to change this rule, especially without evidence that the remaining assets are sufficient to pay the claims of preferred depositors. A trust company can be dissolved "by act of law" in only one way, namely, by judgment of court upon a *scire facias* brought in the name of the State. *Green v. St. Albans T. Co.* 57 Vt. 340.

The only other ways by which a chartered corporation can be dissolved, are: (1) by expiration according to the terms of the charter; (2) by voluntary surrender of the franchise to the State,—this must be by vote of the stockholders, and the surrender must be accepted by the legislature;—(3) by legislative enactment not in violation of the Constitution. *Morawetz*, Priv. Corp. Chap. 11.

Insolvency of a corporation does not dissolve it, or operate as a cause of forfeiture (*Boone*, Corp. s. 302; *Ang. & A. Corp.* 11th ed. s. 770; *Morawetz*, Priv. Corp. ed. 1882, s. 636; *Coburn v. Boston P. M. Co.* 10 Gray, 243; *Boston Glass Manufactory v. Langdon*, 24 Pick. 49, 53; *People v. Hudson Bank*, 6 Cow. 217, 219); nor do proceedings in insolvency or in bankruptcy (*Ang. & A. Corp.* 11th ed. s. 770 and note; *Coburn v. Boston P. M. Co.* *supra*; *Chamberlin v. Huguenot Mfg. Co.* 118 Mass. 532, 536); nor does the appointment of a receiver (*Ang. & A. Corp.* s. 770; *Kincaid v. Dwinelle*, 59 N. Y. 548, 552; *Taylor v. Columbian Insurance Co.* 14 Allen, 353).

"Mere nonuser of its franchises by a corporation is not a surrender; nor are courts warranted in inferring a surrender from an abandonment of the franchise in intention only." A surrender must be accepted. *Ang. & A. Corp.* s. 773;

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Morawetz, Priv. Corp. ss. 637, 874; Boone, Corp. s. 201; *Ottaquechee Woolen Co. v. Newton*, 57 Vt. 451; *Brandon Iron Co. v. Gleason*, 24 Vt. 228.

Nor does an omission to elect officers work a forfeiture of the franchise or a dissolution of the corporation. Ang. & A. Corp. s. 771; Boone, Corp. s. 200.

Even where it is admitted, or conclusively shown, that the contingency has happened which the charter expressly provides shall work a forfeiture of the franchise, nevertheless the corporation cannot be said to be dissolved, or treated as dissolved, until judgment of forfeiture has been rendered in a proceeding brought for that purpose by the State. *Connecticut & P. R. Co. v. Bailey*, 24 Vt. 465; *Brandon Iron Co. v. Gleason*, id. 228; *Vermont & C. R. Co. v. Vermont Cent. R. Co.* 34 Vt. 2, 55; *Briggs v. Cape Cod Ship Canal Co.* 17 Rep. 688; 137 Mass. 71; Ang. & A. Corp. s. 777; Morawetz, Priv. Corp. s. 631.

A court of equity has no power to decree a forfeiture of the franchises of a corporation. *Ormsby v. Vermont Copper Min. Co.* 47 Vt. 713.

"A case of forfeiture cannot be taken advantage of or enforced against a corporation collaterally or incidentally, or by any other mode than by a direct proceeding for that purpose against the corporation. \* \* \* And the government creating the corporation can alone institute such a proceeding." Ang. & A. Corp. s. 777; Boone, Corp. s. 205; Morawetz, Priv. Corp. s. 636; Vt. cases, *supra*.

*Ottaquechee Woolen Co. v. Newton*, 57 Vt. 451, is entirely conclusive against the petitioners; and the opinion and briefs afford a very full list of authorities, to which may be added the recent cases of *Atty-Gen v. Chicago & E. R. Co.* 112 Ill. 520; *North. v. State*, 5 West. Rep. 535, 107 Ind. 356; *Jersey City Gaslight, Co. v. Consumers Gas Co.* 4 Cent. Rep. 330, 40 N. J. Eq. 427; *Seasburgh Turnp. Co. v. Cutler*, 6 Vt. 315.

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The opinion of the court was delivered by

ROWELL, J. Although the history of this case prior to the bringing of this petition fully appears in the report of it in 56 Vt. 476, yet it will be matter of convenience to restate it here as far as necessary to bring out the point now decided.

On August 17, 1883, the inspector of finance proceeded in chancery against the defendant company as an insolvent corporation, and obtained an injunction, restraining it from transacting any further business as a trust company, and from all custody of or interference with its books and property, except to keep and preserve the same, until further order. He at the same time obtained the appointment of a receiver, who was ordered to take possession of the property of the company at once, and to administer it according to law, subject to the further order and direction of the court.

The charter of the company provides that in case of its "dissolution \* \* \* by act of law or otherwise," the debts due from it, "incurred by deposits in favor of minors, insane persons, or married women—such deposits having been made for married women in their own right—shall have a preference and be satisfied before any other debts due from said corporation are paid."

The receiver took possession of the property and began to administer it, and on November 10, 1883, for the purpose of obtaining the direction of the court in respect of such administration, he preferred his petition in the case, setting forth that on October 4, 1883, the court ordered that all creditors of the company should present and prove their claims by December 1, 1883; that pursuant to said order a large number of creditors had proved their claims, and that he had reason to believe that the rest of them would prove theirs within the time limited; and further setting forth the provisions of the charter above recited, and that a considerable number of persons had proved claims for debts due for deposits in favor of minors, insane



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persons, and married women in their own right, and insisted that said claims should be preferred and be satisfied before any other debts due from the company were paid; that he had realized a considerable amount of money from the assets of the company, and expected to realize more therefrom from time to time, and that it was for the interest of the creditors of the company that the funds realized and to be realized, should be paid and distributed to and among them according to their legal rights as soon as might be; that the creditors who claimed no preference insisted upon an equal and a rateable payment and distribution of the funds to and among all the creditors; and praying for an order, directing him in the premises, and prescribing in what order, proportion, and manner payment and distribution should be made with reference to the demands for which preference was claimed and with reference to the other debts of the company.

Notice of hearing on this petition on December 4, 1883, was given to all persons interested by publication of the petition and an order of notice, three weeks successively in the St. Albans Messenger and Advertiser, and by acceptance of service by the chairman of the depositors' committee; and at the hearing the receiver and counsel appeared and represented the general creditors and counsel appeared and represented parties who claimed a preference, and a full hearing was had; whereupon it was ordered and decreed that all the depositors who had proved or should prove their claims as such, stood and should stand "on terms of perfect equality of right to share in the division and distribution of the funds or assets of said company, and that no depositor or class of depositors is entitled to any preference over others," and the receiver was ordered to pay out and distribute the funds and assets accordingly. From this decree some of those claiming a preference appealed to this court, when the decree was affirmed and the cause remanded. Subsequently, and in December, 1884, Mr. Kent and his wife—who was a depositor

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in the company in her own right and had proved her claim pursuant to order—preferred this petition in the case on behalf of themselves and all others in like interest who might choose to come in and share the expense, for the purpose of obtaining a preference under the charter; and divers other persons of like interest have come in, some of whom appealed from the former decree, and so were unquestionably parties to that adjudication.

The ground for claiming a preference before was and now is, not that the corporation has been dissolved by a judicial forfeiture of its charter, but that its state of suspended animation is death within the meaning of the charter, sufficient for the right of preference to attach.

The present petition is defended on two grounds; namely, that the former decree is conclusive, and that there is no dissolution within the meaning of the charter shown.

As to the first ground of defence :

It is claimed that the former adjudication cannot be availed of here, though set up in the answer, because the record of it has not been put in evidence. But this was not necessary. That decree was made in this present case, the whole record of which was before the Court of Chancery, and this appeal has brought it all before this court.—R. L., s. 773; and the court can properly look into it, to see what has been done in the case, without requiring proof in the ordinary way. *Armstrong v. Colby*, 47 Vt., 359. And besides, the petition expressly makes all prior proceedings in the cause a part of itself, but omits to set them out, to avoid prolixity.

It appears that some of the parties that have here intervened were real parties to the proceedings that resulted in the former decree, and so are bound by it to some extent, certainly; but it is said that these petitioners and the rest that have intervened are not bound by it at all, as none of them were real parties to it, and that it does not appear that they had notice of the pendency of the proceedings so they could appear, had they desired to.

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The depositors bear to the company the relation of creditors rather than of *cestuis que trust*. *Pope v. Savings Bank*, 56 Vt., 284. And although under our statute the receiver probably stands as a representative of all the creditors—*High on Receivers*, s. 314; *Talmage v. Pell*, 7 N. Y., 328, 347—yet, as here are conflicting interest between different classes of creditors, and as a right of appeal is given to all persons in interest as in other cases—R. L., s. 3556—there might be some incongruity in saying that the receiver was in court for all in a way to bind all; and more especially so, as the decretal order shows that the receiver and Messrs. Noble & Smith appeared and represented the general creditors, and that Mr. Edson and Mr. Tenney appeared and represented parties claiming to be preferred creditors, from which it would seem that the receiver in point of fact represented the general creditors rather than those claiming a preference.

But the depositors are very numerous, there being more than 2400 of them, and more than 1100 claim a preference. Many of them are undoubtedly dead, some having and some not having personal representatives, and many may have removed from the State or originally lived out of it, so that it would have been entirely impracticable if not impossible to give personal notice to all, and the notice that was given was the only one that could well have been given. Under this notice there was an appearance before the chancellor on behalf of divers persons standing in the same interest as these petitioners and those who have intervened, and a full hearing was had, and an appeal was taken on behalf of eight married women and four minors, some of whom, as we have seen, intervene here, and the case was argued for them in this court by the same counsel who now argue it for the petitioners; and it can justly be said that the rights of the whole class claiming a preference were then fairly represented and fully and honestly maintained and tried; therefore, on well recognized principles, that decree ought to be held binding upon the whole class.

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Although the general rule in equity is, that all persons having an interest in the subject-matter in litigation should be before the court, to the end that complete justice may be done and future litigation prevented; yet, there is of necessity an exception to this rule when a failure of justice would ensue from its enforcement. It is said that the want of parties does not affect the jurisdiction, but addresses itself to the policy of the court; that the rule was made by the court for the promotion of justice, and may be modified by it for the same purpose, and is always more or less a matter of discretion depending on convenience. *Stimson v. Lewis*, 36 Vt. 91. Cases in which the parties in interest are so numerous as to make it impracticable or greatly inconvenient and expensive to bring them all before the court, form an exception to the rule. And this exception applies to defendants as well as to plaintiffs. Take the case of a voluntary association of many persons. It is sufficient in a suit against them that such a number be made defendants as will fairly represent the interests of all standing in like character and responsibility. *Story's Eq. Pl. s. 116*.

In the *City of London v. Richmond*, 2 Vern. 420, which was a bill against the assignee of a lease for the payment of rent and the performance of covenants, it was held that by dividing his interest into a great many shares the assignee had made it impracticable to have all the sharers before the court.

In *Chancey v. May*, Prec. Ch. (Finch's Ed.) 592, one reason given for overruling the demurrer for want of parties was, "that it would be impracticable to make all the proprietors parties, and there would be constant abatements by death and otherwise, and no coming at justice, if all were to be made parties."

In *Lloyd v. Loaring*, 6 Ves. 779, LORD ELDON said he had seen in the manuscript notes "strong passages as falling from LORD HARDWICK, that when a great many individuals are interested, there are more cases than those—which are familiar—of creditors and legatees in which the court will let a few

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represent the whole." He said that there was a very familiar case in which the court allowed a very few to represent the whole world.

In *Adair v. The New River Company*, 11 Ves. 429, he shows how one having a general right at law to demand service to his mill from the inhabitants of a large district, sues in equity: "His demand is upon every individual not to grind corn for their own subsistence except at his mill. To bring actions against every person for subtracting that service is regarded as perfectly impracticable. Therefore a bill is filed to establish the right, and it is not necessary to bring in all the individuals; not because it is inexpedient, but because it is impracticable. The court therefore requires so many that it can be justly said they will fairly and honestly try the legal right between themselves, all other inhabitants, and the plaintiff; and when the legal right is thus established, the remedy in equity is very simple—merely a bill, stating that the right has been established in such a proceeding, and upon that ground a court of equity will give the plaintiff relief against the defendants in the second suit, represented only by those in the first suit." See also *Meux v. Maltby*, 2 Swanst. 277.

So the creditors of an insolvent debtor who execute the assignment, being numerous and some of them out of the commonwealth, need not be made parties to a bill that concerns the assets. *Stevenson v. Austin*, 3 Met. 474.

In a suit by the receiver of a trust and banking company to foreclose a mortgage, the court said it would be oppressive to require all the creditors and stockholders to be made parties. *Mann v. Bruce*, 5 N. J. Eq. 413.

The general rule in equity is that a nominal trustee cannot bring a suit in his own name alone, but must join the beneficiaries; still, it is said that the court will in its discretion dispense with the rule in cases of great inconvenience or of unnecessary expense. *Willink v. Canal & Banking Company*, 4 N. J. Eq. 377.

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Thus, in *Van Vechten v. Terry*, 2 Johns. Ch. 197, which was a bill for the sale of premises mortgaged to the plaintiff by the defendants who were trustees for two hundred and fifty copartners, the court said it would be intolerably oppressive and burdensome to compel the plaintiff to bring in all the beneficiaries, and the delay and expense incident to such a requirement, a reflection upon the justice of the court.

*Stimson v. Lewis*, 36 Vt. 91, was a bill to dissolve a partnership consisting of a great many members, and to close up its affairs and compel contribution; and it was held that all need not be made parties, though it was not said that absentees would be bound.

Here we have a current authority, adopting more or less a general principle of exception by which the rule in equity that all persons interested in the subject-matter of the litigation must be made parties, yields when justice requires it, in the instance of either plaintiffs or defendants. A rigid enforcement of the rule would lead to perpetual embarrassment, and in many cases to an absolute denial of justice; and we think this case in respect of the binding quality of this decree comes necessarily within the exception.

But to what extent is the decree binding? Certainly not to the extent of precluding all future inquiry into this matter, based upon things that have transpired since the institution of the former proceedings; for the doctrine of estoppel by judgment has no application to a case that is ambulatory in its nature and has ceased to be the same by progression. *People v. Mercein*, 3 Hill, 399.

Thus, a judgment for the defendant in an action of trespass *qua. clau.* is not conclusive upon the right of possession at a subsequent time, because intervening events may have restored the plaintiff to possession or terminated the possession or the right that the defendant had at the former trial. *Thayer v. Carew*, 13 Allen, 82. And intervening events affecting the issue may be shown to prevent a former judgment from being

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conclusive even when the title has been tried in a writ of entry. *Perkins v. Parker*, 10 Allen, 22.

The case turned before on the ground that no dissolution was shown; and the only proper inquiry on this point now is, whether one is now shown, produced by that which did not then exist, but has since transpired; and here we must be confined to the time between the institution of the two proceedings, which is a little more than a year.

This petition alleges that before and at the time of the appointment of the receiver, the company was not merely temporarily embarrassed and unable to meet its liabilities as they matured, but was hopelessly insolvent in fact; that since the appointment of the receiver, no meetings of the stockholders nor of the directors have been held; that the directors have neglected to repair the capital stock by assessment, as required by the charter; that the president has absconded and is insolvent; that neither the officers nor the stockholders expect ever to resume the business of the company; that the funds and assets of the company are all gone, and its insolvency so hopeless that the depositors must suffer loss by reason thereof, and that legal remedies against it are unavailing; that it has become and is a mere nominal, inert body, incapable from its insolvency and lack of funds of hereafter carrying its franchise into effect; that on the appointment of the receiver it ceased to own any real or personal estate, and has acquired none since, and does not expect to acquire any; that since his appointment it has done no one act manifesting an intention to resume the exercise of any of its corporate functions; and that the design and being of the corporation has been fully and finally determined.

It will be noticed that some of these things are alleged to have existed before and at the time of the appointment of the receiver; some, from that time; and some, to now exist, without saying when they transpired, much less, that they transpired since the institution of the former proceedings

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unless as matter of inference and by way of *continuation* from an earlier period.

Nor does essential time appear from the report. Most of the things alleged are found to exist at the present time; but it does not appear when they transpired, except as to the depreciation of assets from former estimates, which is found to have been gradual and large during the last two years. But for aught that appears these things may all have antedated the former proceedings to some extent, though probably intensified since by the mutations of time.

It is claimed that this changed condition in the value of assets is of itself alone sufficient to entitle the petitioners to be heard here on the merits. But mere insolvency, however hopeless, has never been held sufficient evidence of a surrender of corporate rights—and this is the theory on which the cases go;—and besides, it does not appear that the company was not before insolvent in fact. That the assets have since depreciated from former estimates does not show it. In the former proceedings the real financial condition of the company did not appear; but, as we have seen, this petition alleges that it was hopelessly insolvent before then, and this is probably true. It is not sufficient to show a *present* state of things adequate to relief, allowing that such a state is shown, which we do not undertake to say, without avoiding the force of the former decree by showing that those things have since transpired; otherwise we might override that decree, and grant relief for that which existed before but was not made to appear, which would be in effect a rehearing.

This makes it unnecessary to consider the other question involved, as to which we express no opinion.

Decree affirmed and case remanded.



ALICE J. AND CARRIE B. SARGENT *v.* ALBERT F.  
BALDWIN AND OTHERS.

*Voluntary Settlement. Powers of Revocation. Trusts. Foreclosure of Mortgage. Parties. Assignment.*

1. A voluntary settlement, fully completed, cannot be annulled by the settlor, when it has been fairly made with knowledge of its effect, and no power of revocation is reserved; thus, the owner of real estate conveyed it to the defendant who executed a mortgage back, conditioned for the maintenance of the mortgagee and his wife and for the payment of \$1000.00 within a reasonable time after their death, to each of their three children, if they survived their parents, and if they did not, then to the heirs of the deceased child. One of the three children having deceased, leaving two heirs, the mortgagor and mortgagee entered into a new agreement, by which these heirs were to receive less than they were entitled to under the mortgage; *Held*, that the effect was to create a trust in the grantee of the real estate and to vest in each of the children of the settlor a right to the sum of \$1000.00, of which they could not be divested without their consent; and that the new agreement was inoperative and void.
2. MORTGAGE, FORECLOSURE OF. A man made a voluntary conveyance of real estate in trust for himself, his wife and children, and the trustee executed a mortgage back to him, his heirs and assigns, to secure the performance of the trust, for the benefit of all the *cestuis que trust*; *Held*, that subsequent to the decease of the settlor and his wife, the heirs of a deceased child could maintain a petition in common form in their own names to foreclose the mortgage, although their claim was disputed and there was no assignment of the mortgage to them.
3. PARTIES. The administrator of the settlor's estate and the two surviving children should have been made parties; and an amendment was allowed that they might be joined.

PETITION to foreclose a mortgage. Heard on petition, answer and amended answer, traverse to the answers, and the report of a master and exceptions thereto, at the December Term, Windsor County, 1886, ROWELL, Chancellor. Exceptions overruled; report of master accepted and confirmed; petition dismissed; exceptions by petitioners.

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The condition in the mortgage is set out in the opinion. One part of the written agreement of February 17, 1879, signed by Thomas Williams and A. F. Baldwin, was in effect, that, as Maria A. Sargent, daughter of said Williams, had deceased, the payment of one thousand dollars mentioned in the mortgage and to be made to said Maria, etc., was to be changed as follows: Said Baldwin was to hold in trust the sum of three hundred and fifty dollars for Alice J. Sargent, granddaughter of said Williams, and pay the interest to her annually, except the first year. He was also to hold three hundred and fifty dollars in trust for said Carrie B. Sargent, and pay the interest to her after she became of age. He was also to hold three hundred dollars and give fifty dollars to each of six grandchildren on their becoming of age.

The petition set out the condition in the mortgage that said Baldwin was to pay \$1,000 to Maria A. Sargent and in case of her decease, was to pay the sum to her heirs; that said Maria A. had deceased prior to the death of said Thomas Williams, and his wife had deceased in July, 1884; that the petitioners are the heirs of said Maria A.; and the prayer was "that the equity of redemption of the said Albert F. Baldwin in the premises may be foreclosed agreeably to the act to diminish the expenses of foreclosing mortgages in equity."

*French & Southgate* and *Geo. L. Fletcher*, for the petitioners. The petitioners can foreclose the mortgage by petition under the statute. *Rev. Laws, Sec. 760*; *Wood v. Adams*, 35 Vt. 300; *Sprague v. Rockwell*, 51 Vt. 401; *Babbitt v. Bowen*, 32 Vt. 437; *Richardson v. Wright*, 58 Vt. 367. The petition is properly brought in the name of the petitioners alone; for their interest is wholly distinct. *Belden v. Manley*, 21 Vt. 550; *Keyes v. Wood*, 21 Vt. 331; *Wright v. Parker*, 2 Aik. 212; 1 Jones Mort. Sec. 821. The same principle applies to the holder of railroad bonds. *Miller v. Rut. & Wash. R. Co.* 40 Vt. 399; *Sewall Brainerd*, 38 Vt. 364. A third person can maintain an action in his favor on a promise to another for his benefit. *Schemer-*

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*horn v. Vanderhoyden*, 1 Johns. 139. The writing or agreement between Baldwin and Thomas Williams of February 17, 1879, can have no effect upon the rights of the petitioners under the mortgage. "Where a right is acquired to one person by the agreement of two others, such right cannot be afterwards defeated by the act of the parties originally contracting." Pothier Ob. Sec. 3 (a) p. 36.

"The law presumes the acceptance of a gift by a donee when it is unaccompanied by any condition to be performed by the donee." Ross J., in *Blanchard v. Sheldon*, 43 Vt. 512; *Howard v. Savings Bank*, 40 Vt. 597. In the last case the deposit of money in a bank in the name of a third person, the depositor retaining the bank book, was held to be a perfected gift and that the "donor had no power to recall the gift." It was held in *Mason v. Hyde*, 41 Vt. 232, where a soldier on enlisting received a town order for his bounty, payable to his son, if he should live to become of age, and if not, to his wife, that the title to the order vested in the son. See *Pope v. Savings Bank*, 56 Vt. 284.

If this was a gift from Mr. Williams it was a perfected one and could not be changed by him. There was a delivery of the property and an acceptance is presumed. Pothier Ob. Sec. 3, 35; 2 Kent Com. 591. The new agreement cannot change the condition of the mortgage. It does not in terms refer to the mortgage; it has no seal, witness or acknowledgement and never was recorded. A contract under seal cannot be changed by parol contract. *Sherwin v. R. R. Co.* 24 Vt. 347; *Patrick v. Adams*, 29 Vt. 376. A discharge of a mortgage at common law must be by deed of release or quit claim. 2 Jones Mort. Sec. 972. A deed of defeasance must be of as high a nature as the deed itself. 1 Jones Mort. Sec. 244. Blanks left in a deed or mortgage cannot afterwards be filled by parol authority. 1 Jones Mort. Sec. 90; *Berwick v. Huntress*, 53 Me. 89; *Wallace v. Harmstead*, 15 Pa. St. 462.

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*C. B. & C. F. Eddy*, for the defendant.

The mortgage conveyance is solely to Thomas Williams, his heirs and assigns. There has been no actual or equitable assignment to the petitioners. The heirs and personal representative of Williams were necessary parties. The personal representative only can discharge or assign the mortgage. Baldwin having derived no advantage by the new agreement, and having in "entire good faith" disposed of and paid out the \$1,000 under it, before he had notice that the petitioners would claim otherwise than by this agreement, it would be inequitable that he should be subjected to the decree prayed for.

It is evident that the petitioners, who are not mortgagees nor assignees nor the owners of the legal estate in the premises, are not entitled to a decree of foreclosure. "The foreclosure of a mortgage by a person not the mortgagee where no assignment has been made, is absolutely void." *Bolles v. Carl*, 12 Minn. 113; *Lyford v. Ross*, 33 Me. 197. If in this case with the allegations and lack of allegations in the petition, a decree of foreclosure should be entered, and the defendant should not make payment and the decree should be recorded, in whom would the title be vested? Clearly not in the petitioners, but in the estate of Thomas Williams. For aught that is alleged or shown the interest in the estate of said Williams and of his two other heirs still continues. Such a mortgage as this in the absence of an actual or equitable assignment, cannot by the statutory petition be foreclosed by anyone save the personal representative of the deceased mortgagee.

Certainly it cannot be foreclosed in detail by independent petitions of several persons having an interest in the entire condition. 2 Jones Mort. (3d ed.) Sec. 1367; *Davis v. Hemingway*, 29 Vt. 438; *Somers v. Skinner*, 16 Mass. 348, 356.

The opinion of the court was delivered by

TYLER, J. The material facts in this case as reported by the master are as follows: On the 9th day of April, 1877,

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Thomas Williams and his wife executed and delivered to the defendant Baldwin a deed of certain real estate situated in Chester, and on the same day Baldwin executed and delivered to Williams a mortgage deed of the same lands, conditioned, first, for the support of said Williams and wife during their lives and for the payment to them of a small sum yearly, and then as follows :

“ And after the decease of said Thomas Williams and Betsey Williams, within a reasonable time pay \$1,000 to each of their heirs ; that is, \$1,000 to their daughter, Laurenza S. Baldwin, wife of Albert F. Baldwin, \$1,000 to their son, Warren C. Williams, and \$1,000 to their daughter, Maria A. Sargent, wife of E. P. Sargent ; and in case either of the said heirs are not living at the decease of the said Thomas and Betsey, pay to their heirs the said \$1,000.”

Maria A. Sargent died in August, 1878. The petitioners, Alice J. and Carrie B., are her heirs. On February 17, 1879, Williams and Baldwin entered into a new agreement in writing by which they intended to change that part of the condition in said mortgage which relates to these petitioners, and intended and expected that the new agreement would so far take the place of and supercede the condition in said mortgage. Williams and wife died in July, 1884.

The master finds, that Williams and Baldwin acted in good faith in making the new agreement ; that the petitioners did not consent to it and had no knowledge of it ; that it was not beneficial to them, as under it they would have been entitled to a considerably less sum than under the mortgage.

I. The case presents the question as to the rights and power of the mortgagor and mortgagee, by a parol agreement, to alter the terms and conditions of the mortgage so far as the heirs of Mrs. Sargent are concerned, the defendant claiming it was within the power of Williams to make the change evidenced by the new agreement and the petitioners claiming it was inoperative as to them.

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The law relating to voluntary settlements has been the subject of wide discussion in English and American courts. An early case, referred to by text-writers, is *Villers v. Beaumont*, 1 Vern. 99, decided in 1682. In that case William Beaumont, who was entitled to a lease of a hospital in Leicester for three lives, a short time before his death, by a little scrap of paper at an ale-house, but under his hand and seal, settled the term upon the plaintiffs, who were his cousins, to the intent to pay his debts, and gave the surplus to them. Afterwards being dissatisfied with the settlement, he made his will in writing, whereby he devised the term, subject to the payment of his debts, to the defendant. After arguments Lord Chancellor NOTTINGHAM said: "There is no color in this case. If a man will improvidently bind himself by a voluntary deed and not reserve a liberty to himself by a power of revocation, this court will not loose the fetters he hath put upon himself, but he must lie down under his own folly; for if you relieve in such a case you must consequently establish this proposition, viz.: *That a man can make no voluntary disposition of his estate but by his will only, which would be absurd.*"

A voluntary settlement binds the party making it, nor can he alter it, how much so ever he may be inclined to do so, unless there be a power of revocation. *Ambler*, 266.

*Boughton v. Boughton*, 1 Atk. 625, was a case where a voluntary deed, not at all unfair, which was kept by the person making it and never cancelled, was sought to be set aside by a subsequent will. The Lord Chancellor said: "The will is no more than voluntary, and as there is no case where a voluntary settlement has been set aside by a subsequent will, this no longer remains a question."

In *Curtis v. Price*, 12 Ves. 103, the court said: "It is void only against creditors; and only to the extent in which it may be necessary to deal with the estate for their satisfaction

it is as if it never had been made. To every other purpose it is good. Satisfy the creditors and the settlement stands."

The strictness of the ancient doctrine was somewhat modified by later decisions, in some of which it was held that the absence of a power of revocation was to be regarded as strong evidence that the settlor did not understand the transaction when there was no apparent motive for an irrevocable gift. *Bridgman v. Green*, 2 Ves. 627; *Huguenin v. Baseley*, 14 Ves. 273. But in the latter case Lord ELDON said: "Repeating therefore, distinctly, that this court is not to undo voluntary deeds." \* \* \* In other cases it was held that the absence of a power of revocation was only a circumstance to be considered and of more or less weight according to the other circumstances in the case. *Toker v. Toker*, 3 De G. & S. 487.

In *Ellison v. Ellison*, 6 Ves. 656, Lord ELDON said; "But if the trust is perfectly created, so that the donor or settlor has nothing more to do, and the person seeking to enforce it has need of no further conveyance from the settlor, and nothing is required of the court but to give effect to the trust as an executed trust, it will be carried into effect at the suit of a party interested, although it was without consideration and the possession of the property was not changed; and this will be true although the person who is intended to be benefited has no knowledge of the act at the time it was done, provided he accepts and ratifies it when he is notified. But if there is any fraud, accident, or mistake, in the transaction, courts will not carry a voluntary trust into execution." Perry in his work on Trusts, section 98, adopts this declaration as the law on this subject, and cites numerous authorities in support of it.

In *Garnsey v. Mundy*, 24 N. J. Eq. 243, it was held that a voluntary trust-deed which reserves no power of revocation and was made with a nominal consideration and without legal advice as to its effect, should be set aside on the application of the settlor, there being evidence that its effect was misunderstood both by the settlor and her relatives who induced her to make

the conveyance, and that in some particulars it defeated the real intentions of the parties. This case is reported in Vol. 13, Am. Law Reg. with learned notes by Mr. Bispham, in which he reviews the leading cases on this subject, some of which are above referred to, and from which he draws the following conclusions :

“ Where there is a deliberate gift, with full knowledge of the consequences of the act, made by a person *sui juris*, the absence of a power of revocation is not *prima facie*, enough to set the instrument aside. The absence of motive is immaterial, if an intent to make an irrevocable gift is apparent ; and, it is submitted, that this intent is sufficiently proved, in the first instance, whenever a person of sound mind and *sui juris* executes an instrument of whose contents he has been informed.”

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“ It is a well settled rule \* \* \* that an executed, voluntary settlement, not tainted with fraud, or affected by mistake, is binding on the settlor. No matter how unfortunate, unjust or absurd such a settlement may unexpectedly prove to be, the general rule, above stated, is certainly beyond dispute.” See *Kekeach v. Manning*, 1 De G. M. & G. 176 ; 1 Hill on Trustees, 140.

Upon a careful examination of this subject we have been unable to find any case where equity has set aside a voluntary settlement except on the application of the settlor, and then only on the ground of fraud, or where the settlement was unadvised and improvident, or contrary to the intention of the settlor.

In *Salisbury v. Bigelow*, 20 Pick. 174, the court said : “ It seems to be a well settled principle of equity, that when a voluntary settlement is fairly made it cannot be annulled by the settlor, unless a power of revocation be reserved for that purpose.” See also *Stone v. Hackett*, 12 Gray, 227 ; *Viney v. Abbott*, 109 Mass. 300 ; and *Sewall v. Roberts*, 115 Mass. 262.



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All questions as to voluntary, executed trusts, their creation without pecuniary consideration and without notice to the *cestuis que trust*, were fully considered and settled by this court in *Barber, Adm'r, v. Thompson*, 49 Vt. 213, a case very similar in its material facts to the present one, and in which the learned judge in his opinion recognized and reaffirmed the well settled law on this subject.

In a recent case the Court of Appeals of New York held that: "When the owner of lands deeds them and takes from the grantee a mortgage securing the payment of an annual sum to his granddaughters or their guardians until they shall arrive at age, a valid irrevocable trust is thereby created, and the trustee has no power to annul or change the conditions of the trust, and the execution of a discharge of the mortgage by the trustee in contravention of the trust and without its fulfillment, is, as to such trust and the interests of the beneficiaries, unauthorized and void." *McPherson v. Rollins*, Cent. Rep. vol. 9 832; *Martin v. Funk*, 75 N. Y. 134.

The obvious purpose of Thomas Williams in making the conveyance of his real estate to his son-in-law, Baldwin, was to provide a maintenance for himself and wife during their lives, and upon their decease to settle the sum of one thousand dollars upon each of his three children, Laurenza S. Baldwin, Warren C. Williams and Maria A. Sargent, and upon the heirs of his children, respectively, if the latter should decease before Williams and his wife. The mortgage was given by Baldwin to Williams to secure the fulfillment of that purpose, and the two instruments, which were executed at the same time, must be regarded as constituent parts of one transaction. They contained no power of revocation, and when delivered and recorded, Williams was divested of the title to the real estate in question beyond recovery, provided Baldwin performed the conditions of the mortgage, and the liability of the mortgagor was fixed to perform those conditions.

The effect of this transaction was to create a trust in Baldwin and to vest in the three children of the settlor a right to the sum of one thousand dollars each, a right of which they could not be divested without their consent. It was a voluntary conveyance in trust, fully executed and completed, for the settlor and his wife and the beneficiaries named. It was not tainted with fraud, and there is no claim that it was made under any misapprehension as to its legal effect.

The right of Maria A. Sargent to her sum of one thousand dollars, which was in legal effect carved out of her father's estate and deposited in the hands of the trustee for her, by the terms of the trust, vested in her and her heirs without any provision for a defeasance.

The result is we hold that the agreement of February 17, 1879, was inoperative to disturb the trusts created April 9, 1877, or the rights of the *cestuis que trust* under the same.

II. The mortgage was made to Thomas Williams and his heirs and assigns; but it was for the benefit of all the *cestuis que trust*, as the promise contained in the condition thereof was to them. When the several sums became due to them, on failure of the defendant to make payment they could avail themselves of the mortgage security.

In *Keyes v. Wood et al.* 21 Vt. 331, it was held that where notes secured by mortgage were assigned by the payee, the mortgage in equity went with them, even though the assignee, at the time of the assignment, did not know of the mortgage security, and that on an assignment of a part of the notes a *pro rata* portion of such security accompanied them. See also *Belding v. Manly*, 21 Vt. 551.

In *Sewall v. Brainerd*, 38 Vt. 364, and *Miller v. R. & W. R. R. Co.* 40 Vt. 399, it was held that matured coupons of a railroad company mortgage bonds were a constituent part of the mortgage debt, and that an assignment of them carried with it by necessary implication an interest in the mortgage

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security. The case at bar presents as strong a right in the petitioners, for here the promise is to certain persons named or their heirs.

We have no question as to the right of the petitioners to maintain this form of action. A petition to foreclose a mortgage is as proper in disputable as in undisputed cases. *Wood v. Adams*, 35 Vt. 300.

We are of opinion, however, that Laurenza S. Baldwin, Warren C. Williams and the administrators of Thomas Williams' estate, having an interest in the mortgage, should be made parties to the proceeding. The decree of the chancellor dismissing the petition is reversed and cause remanded to the Court of Chancery with right in the petitioners to ask leave to amend the petition by bringing in the persons above named as parties thereto. When the petition is so amended the petitioners may have a decree according to the prayer of the petition as provided in the mandate.

## RALPH E. WELLER v. CITY OF BURLINGTON.

*Municipal Corporations. Highways. Coasting.*

The plaintiff while travelling on a street in the defendant city was injured by a collision with a sled on which were several persons engaged in coasting. The city's charter conferred upon it authority over its streets, and compelled it to keep them in sufficient repair. Coasting was prohibited by an ordinance; but it was found that its practice, where and at the time the accident occurred, had been permitted to become a dangerous public nuisance, known to the mayor and the other officers, or which might have been so known, by the exercise of reasonable diligence; that it was also known to the greater part of the citizens and taxpayers, and approved of by them; that a majority of the board of aldermen expressly approved, though not by official action, of using the street for coasting, and that the minority did not object; *Held*, that the city was not liable, on the ground that, there being no express statutory liability, there was not an implied one, arising from the acceptance of the charter for injuries resulting from defective streets.

TRESPASS on the case. Plea, general issue. Trial by court, September Term, 1886, Chittenden County, TAFT, J., presiding. Judgment for the plaintiff. Reversed.

The case appears in the opinion.

*W. L. Burnap, H. Ballard and Robert Roberts*, for the defendant.

There is no other contract or obligation between the State and a municipal corporation accepting a charter than such as the charter implies. Dill. Mun. Corp. ss. 965, 980, 1000, 1018. See *Welsh v. Rutland*, 56 Vt. 228; *Hill v. Boston*, 122 Mass. 344; *Detroit v. Blackeby*, 21 Mich. 84; *Western College v. Cleveland*, 12 Ohio St. 375.

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Corporate officers, though deriving their appointment from the corporation—as a convenient method of exercising a function of government—are the officers and servants of the public at large, and not of the municipality. There is therefore no corporate liability growing out of either nonfeasance or malfeasance on their part. Dill. Mun. Corp. 974, 975.

Granting, then, that this coasting was a nuisance, its suppression was a police duty, and not one in which the corporation, as such, had either any peculiar interest, or could derive any corporate benefit. *Faulkner v. Aurora*, 2 Am. & Eng. Cas. 520; *Schultz v. Milwaukee*, 49 Wis. 254.

New Jersey holds that, without a statute creating it, there is no liability even for acts of positive malfeasance on the part of a municipal corporation. *Pray v. Jersey City*, 32 N. J. L. 394.

See also *Hyde v. Jamaica*, 27 Vt. 443; and *Baxter v. Winski Turnp. Co.* 22 Vt. 114; *State v. Burlington*, 36 Vt. 521.

Suppose the city had passed no ordinance on this subject, it would not have been liable upon the authority of *Hutchinson v. Concord*, 41 Vt. 271. See also *Ray v. Manchester*, 46 N. H. 59.

The following cases were also cited for the defendant :

*Levy v. Mayor*, 1 Sandf. 465; *Bailey v. Mayor of N. Y.* 3 Hill, 531; *Lorillard v. Monroe*, 11 N. Y. 392; *Mitchell v. Rockland*, 52 Me. 118; *Buttrick v. Lowell*, 1 Allen, 172; *Clark v. Waltham*, 128 Mass. 567; *Fisher v. Boston*, 104 Mass. 87.

*E. R. Hard* and *J. E. Cushman*, for the plaintiff.

In none of the reported cases involving the question of corporate liability for an injury caused in such a way as this was, has the fact of the almost unanimous approval of the community been developed; if it had, it may fairly be supposed that in

some, at least, of the cases in which such liability was denied, a different result would have followed.

The distinction between cities, existing by special charter, and ordinary towns, in respect to their obligations and liabilities, is recognized by all the authorities; the former being held to a much more extended liability than the latter.

1 Dill. Mun. Corp. ss. 22, 23, 26; 2 Dill. Mun. Corp. s. 961; 2 Add. Torts, 1298, 1300; Cooley, Const. Lim. 303, 304.

This distinction renders the case of *Hutchinson v. Concord*, 41 Vt. 271, and other similar cases in which towns have been held not liable, of no force as authorities in favor of the defendant in the present case.

The right of the plaintiff to recover upon the facts stated in this record is distinctly recognized and affirmed in the following cases: *Baltimore v. Marriott*, 9 Md. 160; *Taylor v. Cumberland*, 64 Md. 70; *Little v. Madison*, 42 Wis. 643. See *Stanley v. Davenport*, 54 Iowa, 463; 19 Am. L. Reg. 11.

In *Baltimore v. Marriott*, the injury was caused by ice in the street; and the court said: "The people of Baltimore, in accepting the privileges and advantages conferred by their charter, took them subject to the burthens and restrictions which were made to accompany them under the same charter. One of these burthens was the obligation to keep the city free from nuisances."

In *Taylor v. Cumberland*, 64 Md. 70, the plaintiff was injured by collision with a sled on which some boys were coasting in the street; and the court held that, the mere passage of an ordinance prohibiting nuisances, was not a complete discharge of the duty of the city.

Without any express legislation to that effect, cities are held liable for injuries to travellers, caused by defective highways within their limits; this liability being based, in the decisions, upon an implied duty resulting from power and authority of cities over the highways. While on the other hand, it is held

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with equal unanimity, that *quasi* corporations are not so liable, without express legislation.

2 Dill. Mun. Corp. ss. 998, 999, 1017, 1018; Whart. Neg. ss. 956, 959; 2 Add. Torts, 1308; Cooley, Const. Lim. 305; Cooley, Torts, 655.

*Welsh v. Rutland*, has no application to the present case, because the village of Rutland, was only a *quasi* municipal corporation, (see charter, Acts, 1847, 100) and was so considered by the court.

In *Gordon v. Richmond*, Va. Ct. App. June, 1887, S. E. Rep. 727, the plaintiff in error, in passing along a street in Richmond, fell and was injured by reason of the want of repair of a sidewalk. The court said: "It is the duty of a municipal corporation, which by its charter has the power, to keep its streets and sidewalks in safe condition."

See *Rushville v. Adams*, 5 West. Rep. 682; 107 Ind. 475; *Kurr v. Troy*, 6 Cent. Rep. 493, 104 N. Y. 344; *Barnes v. District of Columbia*, 91 U. S. 540 (23 L. ed. 440); *Weightman v. Washington*, 66 U. S. 1 Black, 39 (17 L. ed. 52); *Nebraska City v. Campbell*, 67 U. S. 2 Black, 590 (17 L. ed. 241); *Mayor of N. Y. v. Sheffield*, 71 U. S. 4 Wall. 189 (18 L. ed. 416). See *Seele v. Deering*, 4 New Eng. Rep. 550; *Grove v. Ft. Wayne*, 45 Ind. 429.

In *Ray v. Manchester*, cited by the defendant, the injury was caused by boys coasting; but in that case, it did not appear that the defendant was an *incorporated city* nor that any ordinance on the subject of coasting had been adopted; nor did it appear that at the time of the accident, any one was coasting except the party who caused the fright of the horse; nor that they had been so engaged for any length of time previous to the accident; nor that any coasting in the street had been practiced within two weeks previous to the accident; nor that any of the residents of the city participated in coasting at any time; nor that any of the officials or inhabitants of Manchester ever approved of such coasting.

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The opinion of the court was delivered by

ROWELL, J. This is an action on the case to recover for injuries received by the plaintiff while travelling on Main Street in the defendant city, by being run into by a sled on which some persons were coasting down the street.

The charter confers upon the city authority over its streets, and makes it its duty to keep them in suitable and sufficient repair, but imposes no greater duty in this behalf than is imposed upon towns in respect of their highways. It also provides for the raising of money for the performance of this duty, and empowers the city to prevent the practice in its streets of any amusements that have a tendency to injure or annoy persons passing thereon, or to endanger the security of property.

At the time in question there was an ordinance in force, forbidding under penalty coasting on any of the streets and highways of the city except such as the mayor and the board of aldermen should designate for that purpose, and Main Street had not been thus designated, so that coasting thereon was unlawful; and constables and all police officers were especially directed by the ordinance to see that its provisions were enforced.

The charter makes the mayor the chief executive officer of the city, and charges him with the duty of using his best efforts to see that the laws and the city ordinances are enforced, and that the duties of all subordinate officers are faithfully performed.

On the evening the plaintiff was injured, several persons others than those whose sled injured him were coasting down Main Street; and the street had been similarly used by many persons, mostly residents of the city, for three or more evenings within the last ten days; and the practice of coasting on the street had become and was a dangerous public nuisance. The use of the street for coasting was all the while known to the



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mayor and the other officers of the city, or would have been known to them by the exercise of reasonable diligence on their part, and was also known to the greater part of the substantial citizens and taxpayers of the city, and approved of by them. It was also expressly approved of by a majority of the board of aldermen, though not by official action, and the minority of the board did not object to it.

A few days before the accident, the mayor publicly designated certain streets for coasting and sliding, and gave notice that coasting and sliding on all other streets of the city were forbidden by ordinance; but this was the only official action taken for its enforcement, and it is found that the city was negligent in this behalf; and the plaintiff claims that as the city is a municipal corporation proper as distinguished from a *quasi* or other public corporation, it is liable for injury resulting from such negligence.

It is said that this case is distinguishable from all others on this subject, in that here a majority of the citizens and taxpayers approved of the practice of coasting. But this makes no legal difference; for a city cannot be affected in such matters by the individual action of its citizens, any more than a town can be by such actions of its citizens; and it has always been held that a town cannot be thus affected.

It is true that there is a difference between cities, which are voluntary corporations existing by special charters, and towns, which are involuntary corporations, with privileges and duties more limited and restricted than those of cities; but does that difference go to the extent claimed here? for it is certain that a town would not be liable in a case like this.

The fundamental proposition of the plaintiff is, that inasmuch as the law confers upon the city, power and authority over its streets, it therefore by implication, imposes upon it a duty to prevent the nuisance of coasting thereon; and that for an injury

resulting from a negligent omission of such duty an action lies. In other words, that the duty creates the liability. And the argument is, that the grant to cities of corporate franchise is usually made only at the request of the citizens to be incorporated, and is supposed to be a valuable privilege, and a consideration for the duties imposed; that larger powers of self-government are given to them than to towns and counties; larger privileges in the acquisition and control of corporate property; special authority to use their streets for the peculiar convenience of their citizens in various ways not otherwise permissible; that a grant from the State of a portion of its sovereign power, and an acceptance thereof for these beneficial purposes, raised an implied promise on the part of the corporation to perform its corporate duties, not for the benefit of the State only, but for the benefit of every individual interested in their performance as well; and that, having accepted a valuable franchise on condition of performing certain public duties, they stand like private corporations aggregate, and are held to contract for the performance of those duties.

The decisions in this country on this subject are not uniform, and Judge Dillon groups them into the following classes: (1) Those in which neither chartered cities nor counties are held to an implied civil liability. (2) Those in which *both* chartered cities and counties are thus held for *neglect* of duty. (3) Those in which municipal corporations proper, such as chartered cities, are thus held for damage caused to travellers for defective and unsafe streets under their control, but which deny that such liability attaches to counties and other *quasi* corporations in respect of highways and bridges under their control. He says this last distinction has received judicial sanction in a large majority of the States where legislation is silent as to corporate liability, but that the reason for the distinction is not so satisfactory as could be desired. But in New England, he says, towns and cities are treated alike in this respect; and that there is no implied liability here upon either for injuries result-

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ing from defective streets and sidewalks, but that such liability is wholly statutory. And in this he borne out by the cases, as will be seen by reference to *Hill v. Boston*, 122 Mass. 344, where they are largely collated and commented upon.

The New England idea is, that creating villages and cities by legislative action does not by implication impose upon them civil liability for the neglect of corporate duties in respect of those matters that are governmental in their nature, and which they administer as it were for and in behalf of the state, such as the control of streets and the like. While on the other hand, in respect of those matters that are not governmental in their nature, but are for the private advantage and emolument of the municipality, such as water-works and the like, they are held liable much as an individual or a private corporation aggregate would be.

But it is unnecessary to pursue the subject further, for we regard the question settled in this State by *Welsh v. the Village of Rutland*, 56 Vt. 228.

The only answer the plaintiff makes to that case is, that the village was only a *quasi* municipal corporation, and was so regarded by the court, and that the case was such as to render seemingly unnecessary the discussion as to the liability of such corporations in respect of such matters.

But the village of Rutland is as much a municipal corporation proper as the city of Burlington is, and its chartered powers and privileges are much the same, barring the form of government; and although in that case the chief justice speaks of *quasi* corporations as if the village was one, yet the court did not so regard it, and he evidently is speaking in a general way of public corporations as distinguished from private corporations aggregate, not intending to assign the village to that class of public corporations technically called *quasi* corporations, because on account of the limited number of their corporate powers, they rank so low in the scale of corporate existence.

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Counties, school districts, and perhaps towns, are of this class. But cities and incorporated villages are nowhere called or treated as *quasi* corporations, but as municipal corporations proper, as having the most of corporate life; but they are all public corporations, and agencies in the administration of civil government. And further on in the opinion the chief justice speaks of municipal corporations, and argues along the line of the law applicable to such corporations proper; which shows that the case was not put upon the ground that the village was a *quasi* corporations.

As to its not having been necessary for the court to discuss the subject, it is sufficient to say that the case was treated as involving the question, and the point was fully discussed and decided; and on this further discussion and consideration we are confirmed in the correctness of our former views, and re-affirm them.

Judgment reversed and judgment for the defendant.

POWERS, J., was absent.

## JANE FARRANT v. F. C. BATES.

*Practice. Exceptions. Judgment. Riparians Rights. Navigable Lake.*

An exception to the rendition of a judgment upon a special verdict does not reach back to a question, whether raised or not on trial, to which no exception was reserved, and which it is not necessary to determine in order to render a valid judgment. Thus, in such case it was held that whether the court erred in omitting to submit to the jury questions and instructions which ought to have been submitted was not open to review. *Goodenough v. Huff*, 53 Vt. 482, distinguished.

*TRESPASS quare clausum fregit.* Trial by jury, February Term, 1886, Orleans County, Ross, J., presiding. Judgment on a special verdict for the plaintiff. Affirmed.

The Newport & Richford Railroad runs across the premises in question, and along and near Lake Memphremagog. The defendant, at the time of the alleged trespasses, was the owner of a veneer mill situated near said lake; and it was in bringing the logs intended for use in the mill over the railroad, and rolling them from the cars on to the dump, and thence into the lake, that said trespasses were committed. It was conceded that the plaintiff owned the premises described in the declaration, of which she claimed that the strip in controversy formed a part. The plaintiff's evidence tended to show that said railroad was built in 1872; that the next year the husband of the plaintiff built a fence, both sides of the railroad, along the foot of the dump, from two to six feet from the dump and between it and the lake; that the fence was maintained till 1880, but finally disappeared, or the most part, except posts in the ground; that plaintiff afterwards caused the fence to be rebuilt, and claimed, among other things, to recover for its destruction; that, previous to and at the time of building the

railroad, there was a strip of land between the line where the fence stood and low-water mark ; that this strip varied in width from one to four rods, and was of considerable value for the purposes of cranberry culture and a mill site, and was covered with bushes from six to ten feet high ; that the defendant rolled some of the logs across said strip of land when not covered with water, broke down the fence and bushes, and that he boomed his logs against and upon said strip, attaching the end of his boom to the railroad dump. The defendant's evidence tended to show that when the railroad was constructed (forty-one and one-fourth feet from the central line of survey) there was no land between the line where the fence stood and low-water mark ; that after the building of the railroad there was only a narrow strip (in some seasons none at all) exposed for a few days between the foot of the dump and low-water mark, and that this had been entirely formed by the spreading out of the dump in the soft bottom, and the action of the waves in washing down the sand from the dump ; that this strip could be of no use for an agricultural purpose, or any purpose, except to pass over in going from the railroad dump to the lake ; that said lake was navigable ; that its waters varied in height from four to six feet between high and low-water mark, and during the greater part of the year the waters of the lake washed the foot of the dump ; and that said trespasses were committed by rolling logs from the cars on to the dump, and from the dump on to the ice or into the water, which came nearer the dump than the fence, and so floating them out into the water without actually touching the land claimed by the plaintiff ; that he committed said supposed trespasses by the consent and direction of the managers of said railroad.

On October 28, 1884, the plaintiff executed to the railroad a deed of right of way, which was to be "the same width as it is now fenced." The railroad had paid no land damages till this deed was given. The plaintiff's evidence tended to show that she rebuilt the fence soon after this deed was given, and

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that the trespasses were committed at various times between July 1, 1883, and December 27, 1884. The main contention was whether there was a strip of land where said logs were rolled off, between the original fence, or its remains, and low-water mark of the lake, at the time the railroad was built and subsequently. The question whether the lot extended into the lake was not presented to the jury. The court submitted the questions in the special verdict to the counsel of both parties, and they made no objections thereto, and did not suggest any other subject of inquiry to be submitted. The following is a copy of the verdict :

Q. Where was the low-water mark of the lake, between the point to which the defendant's boom is attached and where the line of the plaintiff crosses the knoll, when the railroad dump along there was constructed? Nearer, at, or farther from the lake than where the plaintiff's fence, or remains of such fence, were October 28, 1884, when the plaintiff and others decided to the railroad company?

A. Nearer the lake.

Q. Where was the low-water mark of the lake, at the same place as stated in question 1, from July 1, 1883, to Dec. 27, 1884? Nearer, at, or farther from the lake than the fence, or remains of fence, were October 28, 1884?

A. Nearer the lake.

Q. If question 2 is answered "nearer the lake," was the low-water mark of the lake at that place made by building the dump of the railroad along there?

A. In part.

Q. Where was the low-water mark of the lake at the place stated in question 1, when the railroad company entered upon the land now owned by the plaintiff to construct its road? Nearer or farther than forty-one and one-fourth feet from the centre line of the railroad as constructed?

A. Nearer.

Q. When the railroad dump was constructed, did the high-water mark of the lake come to the fence located as claimed by the plaintiff on the lake side? And, if so, how much of the time each year did it reach the line of said fence?

A. It did for nine months in the year.

Q. Has the defendant committed any trespasses upon the plaintiff's premises, other than on the strip of land in controversy, between July 1, 1883, and December 27, 1884?

A. No.

Q. What damages, if any, has the plaintiff sustained by the trespasses of the defendant on the strip of land in controversy, between July 1, 1883, and December 27, 1884?

A. Five dollars.

Q. What damages, if any, has the plaintiff sustained by the trespasses of the defendant on her premises, at places other than on the strip in controversy, between July 1, 1883, and December 27, 1884?

A. Not any.

*T. Grout, J. C. Burke and C. A. Prouty*, for the defendant.

The first question is whether the owner of land bordering on a navigable lake has the same title to the strip between high and low-water mark that he has to the land above high-water mark, or whether his title is of a qualified character. There is no evidence that the plaintiff's lot extended into the lake, or, at least, that question was not submitted to the jury. In navigable waters the State holds title to land between high and low-water mark. *Gould v. Hudson R. R. Co.* 6 N. Y. 552; *State v. Jersey City*, 25 N. J. L. 525.

In England only those waters were termed navigable in which the tide ebbed and flowed; but in the United States all those waters are called navigable which are navigable in fact.

*Genesee Chief v. Fitzhugh*, 53 U. S. 12 How. 443 (13 L. ed. 1058); *Barney, v. Keokuk* 94 U. S. 324 (24 L. ed. 224); *Martin v. Waddell*, 39 U. S. 16 Pet. 367 (10 L. ed. 996);



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*Pollard v. Hagan*, 44 U. S. 3 How. 213 (11 L. ed. 565);  
*Goodtitle v. Kibbe*, 50 U. S. 9 How. 471 (13 L. ed. 220).

These cases related to tidewater, but the principles enunciated in them apply to all navigable waters. The tendency of recent decisions seems to be that a riparian owner of land bordering on a navigable lake holds to the ordinary waterline.

*Seaman v. Smith*, 24 Ill. 521; *Delaplaine v. Chicago & N. W. R. Co.* 42 Wis. 214; *Diedrich v. Northwestern R. R. Co.* Id. 248.

The defendant had a right to occupy this shore as he did, it being a part of the lake itself for nine months in the year.

*Harvard College v. Stearns*, 15 Gray, 1.

The owner of soil which, in its natural state, is covered with navigable water during the greater part of the time, holds his title subject to the public right of navigation. *Martin v. Waddell*, *supra*; *Blundell v. Caterall*, 5 Barn. & Ald. 268; *Olson v. Merrill*, 42 Wis. 203.

One is not liable in trespass who enters upon a strip like this when it is not covered by water, and digs up the soil for the purpose of taking shell fish. *Peck v. Lockwood*, 5 Day, 22.

One who leases the right to anchor a raft opposite his land on a navigable stream cannot recover the contract price, because he had no right to lease. *Moore v. Jackson*, 2 Abb. N. C. 211.

The court in this state has apparently denied the right to wharf out into deep water (*Austin v. Rutland R. R. Co.* 45 Vt. 215); but, if the rule should be held otherwise, then the defendant is entitled to a new trial; because, if the court omitted to submit any question, or give any instructions, which ought to have been submitted or given, it is cause for a new trial (*Goodenough v. Huff*, 53 Vt. 482).

The defendant's evidence tended to show that he rolled his logs directly from the dump into the water, and this question ought to have been submitted to the jury.

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*Edwards, Dickerman & Young*, for the plaintiff.

The plaintiff had such an interest in the land between high and low water mark that she could maintain trespass for an injury upon it. *Clement v. Burns*, 43 N. H. 609.

She could have erected a wharf on this strip of land. *Rex v. Russell*, 13 E. C. L. 271.

"The public have no common-law right of bathing in the sea," and cannot cross the seashore on foot for that purpose.

HORLOYD, J., in *Blundell v. Caterall*, 7 E. C. L. 91; *S. C.* 5 Barn. & Ald. 268.

In the same case BAILEY, J. said: "But, if A hath the *ripa* or bank of the port, the king may not grant a liberty to unlade upon that bank or *ripa*, without his consent, unless custom had made the liberty free to all, as in many places it is; for that would be a prejudice to the private interest of A." Lord HALE was quoted as saying the same; and ABBOTT, Ch. J., said: "Now such consent as applied to the natural state of the *ripa* or bank would be wholly unnecessary, if every man had a right to land his goods on every part of the shore at his pleasure." "The owner of the soil of the shore may also erect such buildings or other things as are necessary for carrying on of commerce." *Blundell v. Caterall*, *supra*, Ang. Tidew.

GEEN, J., says, in *Gough v. Bell*, 22 N. J. L. 441, "That most of the Atlantic States had adopted the principle that extends the riparian owner to low-water mark;" and this was affirmed by the court of appeals. 23 N. J. L. 624.

The riparian owner has the sole right of quarrying stone between high and low-water mark; (*Hart v. Hill*, 1 Whart. (Pa.) 137); to use a spring (*Lehigh Valley R. R. Co. v. Prone*, 28 Pa. 206); to get seaweed cast upon the shore (*Emans v. Trumbull*, 2 Johns. 322); and he may maintain trespass for an entry upon the shore to carry off a wreck (*Barker v. Bates*, 13 Pick. 255).

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Such owner's rights extend so far as they do not interfere with the public interest in navigation. *Frink v. Lawrence*, 20 Conn. 117.

It is a settled rule, "assumed and acted on," says SHAW, Ch. J., in *Barker v. Bates*, *supra*, that the soil in the sea shores and flats of our maritime frontier is the property of the riparian owner, subject to certain modifications. *Storer v. Freeman*, 6 Mass. 435; *Parker v. Smith*, 17 Mass. 413; *Lapish v. Bangor Bank*, 8 Greenl. 85.

If any land was made outside the fence by the railroad, by placing the dump there, it belonged to the plaintiff. *Nichols v. Lewis*, 15 Conn. 143.

The owner of land bounded on Lake Champlain has a right to low-water mark. *Austin v. Rutland R. R. Co.* 45 Vt. 244; *Jackeway v. Barrett*, 38 Vt. 316.

"A grant bounded by a great pond or lake, which is public property, extends to low-water mark." GRAY, Ch. J., *Paine v. Woods*, 108 Mass. 160. See *East Haven v. Hemingway*, 7 Conn. 203; Gould, Waters, 156; *Champlain & St. L. R. R. Co. v. Valentine*, 19 Barb. 491; *Waterman v. Johnson*, 13 Pick. 265; *Wood v. Kelley*, 30 Me. 55; 5 Wend. 423; 7 Allen, 158; *Fletcher v. Phelps*, 28 Vt. 257; *Fay v. Salem & D. A. Co.* 111 Mass. 27; *State v. Gilmanton*, 9 N. H. 461; 77 U. S. 10 Wall. 497 (19 L. ed. 984); 66 U. S. 1 Black, 23 (17 L. ed. 29); 4 Wis. 486.

The opinion of the court was delivered by

TAFT, J. The only exception taken upon the trial below was to the rendition of judgment upon the special verdict. There was no general verdict. No exception having been taken to the action of the court in ruling upon any question which arose prior to or at the time the special verdict was returned, there is no question in this court for revision, save the one

taken to the rendition of the judgment; and there was no error therein, if the facts established by the special findings are sufficient to support the judgment rendered. The special verdict, as we construe the answers, established the facts, that the plaintiff owned, and was in possession of, a strip of land uncovered by water, between the old fence and low-water mark, over which the defendant rolled his logs, and in so doing became a trespasser. Such facts were sufficient to support the judgment. The many questions discussed by counsel at the hearing, are not properly before us, no exception having been taken to the action of the court in passing upon them. It is claimed by counsel that if the court below "omitted to submit any question which ought to have been submitted, or to give any instructions which ought to have been given," a new trial should be granted, and cite the case of *Goodenough v. Huff*, 53 Vt. 482. To entitle the party to the benefit of such questions they should have been reserved in the court below; and an exception to the rendition of the judgment upon the verdict does not reach back to questions arising during the trial. The judgment should stand, if facts sufficient to base a judgment upon, were established by the answers to the questions which were submitted; and *Goodenough v. Huff*, *supra*, is not in conflict with this view of the question. In that case the plaintiff sought to recover the amount of a promissory note; one question was whether there was a consideration for the giving of it; the issue was made by the pleadings and the evidence. The court did not submit that question to the jury, only submitting the ones when the note was signed, as that became material under the plea of the Statute of Limitations and the amount due upon it. The special verdict established the facts that the defendant signed the note within six years prior to the bringing of the action and the amount due upon it.

It was incumbent upon the plaintiff under his claim as to when the defendant signed the note, to show a consideration for the signing. The judgment was rendered, not on the

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special findings alone, but also on the undisputed facts as to the circumstances under which the defendant signed the note, as shown by the plaintiff's testimony. The exception of the plaintiff reached every ground of the judgment, one of which was that there was no testimony tending to show a consideration, and as the Supreme Court held there was such testimony, the rendition of the judgment was error. The case, therefore, only amounts to this, that every question involved in the rendition of a judgment is reached by an exception to its rendition, and we think the converse of the proposition is true that the exception does not reach a question, although raised upon trial, that it was not necessary to determine in order to render a valid judgment.

The counsel have thoroughly argued a question involving the rights of riparian owners, but as a majority of the court think the question is not presented by the record, we refrain from any discussion of it. The duty of the court is to pass only upon questions presented by the record.

Judgment affirmed.

## CHARLES C. BROMLEY v. ELI J. HAWLEY.

*Bills and Notes.*

1. The surrender of an overdue note enforceable against one of two indorsers though not against the other or the principal, is a valuable consideration for a new note signed and indorsed by the same parties with an additional indorser.
2. The plaintiff was the owner of \$4,000 note which he purchased of one of the directors of a marble company which issued it, and a little more than two months after it was due he was induced by the same director to exchange the old note for a new one signed by the same party as the old one and with the same indorsers, with this defendant as an additional indorser; *Held*, under the circumstances of the case, that the facts that the note was overdue; that it amounted to \$4,000; that it had different numbers on it,—one placed there by the maker and the other by the bank,—were not sufficient to put the plaintiff upon inquiry; it appearing that he took the note in good faith; and that the party with whom he negotiated was a man of extensive business, and his character and financial standing high.
3. The rights of an indorser of a note are not such that a purchaser is bound to inquire, unless the circumstances are such as ought to excite the suspicion of a prudent and careful man, as to its validity as between the parties to it.

ASSUMPSIT on a promissory note given for \$4,000 by the Dorset Marble Company, dated July 21, 1883, payable in five months after date at the National Bank of Rutland, Vermont, to the order of J. B. Hollister, treasurer of said company, and indorsed by J. B. Hollister, treasurer, E. J. Hawley, the defendant, and J. B. Page, and numbered 445 by said company. Plea, general issue and notice. Trial by court, September Term, 1886, Rutland County, VEAZEY, J., presiding. Judgment for the plaintiff. Affirmed.

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The following facts were found : One Borden of Philadelphia was the owner of the note, and sued it in the name of the plaintiff for convenience. The defendant was an accomodation indorser of the note and of other notes for the marble company. This note was issued by said company and indorsed by defendant and delivered to said Page by the company with right to use it only to raise money or to pay other notes indorsed by the defendant. Page had no authority to use the note for his private purposes, or for any purpose except as specified above. He was one of the directors of the company, and accustomed to negotiate some of its notes. The defendant was president of the company ; and neither he nor the company received any money on this note, nor was it used to pay any paper on which the defendant was indorser, or liable to pay ; nor had defendant any knowledge of Borden, or of any dealings by Page with him. Page at the date of this note was president of the National Bank of Rutland. Prior to January 31, 1883, said bank held and owned said company's note, No. 257, for \$4,000 indorsed by said Hollister and Page. On that day, said note maturing, it was renewed by said bank discounting for the marble company note No. 328, at four months, for the same amount, indorsed by the same parties as the other note, whereby the bank became the owner of No. 328. Page being president of that bank, on February 9, 1883, took the note to Philadelphia and delivered the same to said Borden, who then and there paid to Page therefor the sum of \$4,000, less the discount. It did not appear what Page did with the money, further than, from the books of said bank, that the note was entered thereon as paid to the bank under date of February 13, 1883 ; and there was an entry of " paid " on the bills payable on the books of the Dorset Marble Company. Mr. Borden did not notice the bank numbering (13,157) on this note when he took it ; and testified that that would not suggest to him that the note had been used. It appeared that Borden continued to hold the note No. 328, and forwarded it for collection through several banks to the Rutland County National Bank, which caused

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it to be duly presented at its maturity, and protested June 3, 1883, and to be returned to Borden; that Borden notified the company that he held the note, and urged payment and threatened suit thereon; that on August 23, 1883, Page took the note in suit to Borden, and representing that it would be paid at maturity, and that the defendant was perfectly responsible, induced Borden to give up the overdue note which he then held in exchange for the note No. 445, thus extending the time of payment until December 24, 1883; that Borden had no notice or knowledge of the terms and conditions on which defendant indorsed the note, nor of any fact now claimed to be inconsistent with the propriety of such exchange and extension, other than as herein stated. Said note No. 328 was then returned to the marble company and credited to Page, as shown by the books of the company, and then ceased to be a liability of the company. Said bank did not get the note No. 328 rediscounted in any other way than as above stated. In case of rediscount, the bank indorsed the notes to be rediscounted. This note did not show this. Borden, whose deceased wife was a relative of Page, had previously had transactions with him and lent him money. Borden did not at the time know what had been done with the note (No. 328) before he bought it, nor for what purpose Page wanted the money on it. On December 24, 1883, the note in suit fell due, and it was duly presented, protested, etc., and due notice was given the defendant, and it has never been paid. It was also found that Page was not only a director of the marble company, but he owned nearly one third of the stock thereof, and was agent for the raising of funds for the company; that the company was a corporation organized and located in Vermont, owning marble quarries and mills here, and produced, manufactured, and sold large quantities of marble; that its method of raising funds needed in its business was by issuing commercial paper, like the note in suit, indorsed by its officers and stockholders, and by Mr. Gleason; that this paper



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was largely put into the hands of Gov. Page to negotiate for the use and benefit of the company as he saw fit; but he had no authority to use it for his private benefit; that Page was president of a bank in Rutland where the company did its bank business, and where more or less of its paper was discounted; and that Page infrequently advanced money for the benefit of the company by paying its checks or debts when it was out of funds. At the time the note was negotiated, and for many years prior thereto, Gov. Page was a man of very high standing in public and financial circles, and was engaged in railroad, manufacturing, and banking enterprises on a large scale, and was known in the eastern cities as a man of integrity and high character.

*W. H. Smith*, for the defendant.

This was the first note that plaintiff had had of these parties, and as a "prudent and careful man," he should have made inquiry. *Langdon v. Baxter Bank*, 57 Vt. 1.

The law applicable in this case, in this State, seems well settled in *Roth v. Colvin*, 32 Vt. 125, 135, 137, 138, and has been repeatedly adhered to by this court since. See *Gill v. Cubit*, 10 E. C. L. 154; *Prindle v. Phillips*, 5 Sandf. 157.

As to suspicious circumstances, see *Gould v. Stevens*, 43 Vt. 125.

*Henry A. Harman*, for the plaintiff.

The question as to the consideration of the note in suit is not nearly so strong for the defence as in *Churchill v. Bradley*, 58 Vt. 403.

On the facts, Mr. Borden became in August, 1883, a *bona fide* purchaser of the note in suit for value, and without notice of any equity here claimed by the defendant. He gave up to an officer of the Dorset Marble Company a note which was overdue; he forbore to sue the maker and indorser for a period of nearly four months. He had no knowledge or notice of the terms and conditions on which defendant indorsed the note

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No. 445. Such an exchange is made for a valuable consideration, and precludes the introduction of any such defence.

*Passumpsic Bank v. Goss*, 31 Vt. 315; *Dixon v. Dixon*, Id. 450; *Quinn v. Hard*, 43 Vt. 375; *Russell v. Splater*, 47 Vt. 273.

And this is true, although the note may be sued in the name of an accommodation plaintiff. *Russell v. Splater*, *supra*; *Bennington v. Park*, 50 Vt. 273.

The opinion of the court was delivered by

TAFT, J. I. It is claimed by the defendant that Borden paid no consideration for the note in suit, for that the former note, No. 328, upon and for the surrender of which the note in suit was taken, was of no value in his hands. Whatever rights he may have had against the bank, or any of the parties to the note, save Mr. Page, it is certain that the note was a valid claim against the latter, in the hands of Borden. He had taken it from Page under Page's endorsement, and advanced him the amount of it in money, and however great the fraud, if any there was, on the part of Page in taking the note from the bank and transferring it to Borden, it would not affect the validity of the claim of the latter against Page as endorser. Page could make no defence to such claim. The note No. 328 was therefore of value in Borden's hands, and its surrender would constitute a valuable consideration for taking the note in suit. *Churchill v. Bradley*, 58 Vt. 403.

II. The defendant further claims that the note in suit was taken under such circumstances as to deprive Borden of the character of a *bona fide* holder, without notice of any equities existing in favor of the defendant. The rule in this respect is well stated in Rob. Dig. p. 100, s. 127. "The purchaser of negotiable paper must exercise reasonable prudence and caution in taking it. If the circumstances are such as ought to excite the suspicion of a prudent and careful man as to the validity of the paper as between the parties to it, or the propriety of the transfer, and

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the purchaser takes it without inquiry, he does not stand in the position of a *bona fide* holder, but in the position of the party from whom he takes it, though he may have paid value for it." The question then arises whether there were any circumstances attending the taking of the paper by Borden, which ought to have excited the suspicions of a prudent and careful man, as to the paper, or the propriety of its transfer. If there were, Borden is chargeable with such facts as he would have learned had he actually made inquiry. If he had inquired he would have learned that Page had no right to transfer the note, except for certain specified purposes; and admitting that it was not taken by Borden for such purposes, it is incumbent upon us to say whether any of the facts reported by the court ought to have put him upon inquiry. In this respect but two suggestions are made by the counsel for the defendant. First, the fact that the note for which the one in question was taken, was overdue, and that the one offered for it was good, and would be paid at maturity. The overdue note was given by the Dorset Marble Company, a corporation owning quarries and mills in Vermont, and producing annually a large quantity of marble, and raising funds by issuing commercial paper like the note in suit. Page was a man of high standing financially, engaged in great enterprises, with large financial dealings, and was known as a man of integrity and high character. Borden had theretofore had pecuniary transactions with him and had loaned him money. Now although the fact that the note, No. 328, was not paid at maturity might import insolvency in the sense in which the word is sometimes used, it was far from importing that the paper was worthless, and the fact that to take up the note in question, another was offered, with a name on it, that was represented as perfectly responsible with the further representation that the note would be paid at maturity, would tend to allay any suspicions that might otherwise arise. The defendant was president of the company making the paper; and Borden might well think he was interested in sustaining its credit. Second,

the defendant contends that the amount of the note, four thousand dollars, would suggest more careful scrutiny than if the amount had been small. In this case, we do not think it would; whether it would or not in any given case would to a great extent depend upon circumstances. While it might excite suspicion if a man of no means and of no business should offer a piece of commercial paper for thousands of dollars for sale, none would naturally arise, caused by the amount of the paper, when offered by a man of large enterprises, and who would naturally need large sums in carrying on an extensive and varied business. More careful scrutiny would be suggested if the paper was small; for if Mr. Page, standing as he did financially, engaged in banking and other enterprises, had been endeavoring to raise money on a note for one hundred dollars, instead of one for four thousand, and that in a place so far away from his home and business as Philadelphia, it would naturally suggest, at least in regard to him, and we think the paper, that something was wrong. We fail to see that there was any fact that attended the taking of the note by Borden that should have put him upon inquiry. The defendant's counsel contends with great vigor that this case is within the rule enunciated by DWER. J., in *Pringle v. Phillips*, 5 Sandf. 137, in stating what the principle of the doctrine of constructive notice is, viz.: "When a person is about to perform an act by which he has reason to believe that the rights of a *third party* may be affected, an inquiry into the facts is a moral duty, and diligence an act of justice. Hence he proceeds at his peril when he omits to inquire, and is then chargeable with a knowledge of all the facts that by proper inquiry he might have ascertained;" and that it was incumbent upon Borden to make inquiry at all events, the defendant being a third party. We do not think this rule applies to a surety or endorser upon a note offered for discount or sale, irrespective of any circumstances which should have put the party to whom it is offered upon inquiry. The rule, with the application to the extent claimed in this case, does not prevail in this State, if anywhere.

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If it did, then whoever takes from the holder a note with a surety or endorser takes it subject to all equities existing between the principal and surety or endorser; *i. e.*, if he *must* inquire in all cases where the rights of an accommodation party are involved. That such is not the law, see *Harrington v. Wright*, 48 Vt. 427. The surety upon a note is not a *third* party as to whose rights the taker must inquire unless the circumstances and facts are such as require it under the rule as above stated. We think it is affirmatively shown by the case that Borden took the note in good faith and stands as a *bona fide* holder without notice. Upon the facts reported by the County Court we think there was nothing to put Borden upon inquiry and no error in the judgment; and it is affirmed.

ROYCE, Ch. J., and POWERS, J., did not sit in this case, being absent.

## OLIVER W. FARR v. HIRAM PUTNAM AND OTHERS.

[IN CHANCERY.]

*Lien of Guardian on Ward's Estate. Administrator. Homestead. Husband and Wife.*

1. On the death of an insane ward, his administrator took possession of his estate with the consent of the guardian. The whole conduct of the guardian showed that he did not intend to retain a lien on the *corpus* of the property for what was due him, until after the sale of the property, when it appeared that the estate was insolvent; but he expected to be first paid out of the avails of what was sold; *Held.* (a) That, if the guardian ever had an equitable lien he had lost it; (b) That he had no lien on the homestead; for that also went into the possession of the administrator, with the guardian's consent.
2. On a bill brought in such case to procure a foreclosure of the lien, the court declined to decide whether the guardian had a superior right to the avails of the property after its sale; or whether, on a bill properly drawn, he had such right.

BILL to foreclose an equitable lien. Heard on the pleadings and the report of a special master, February Term, Orleans County, VEAZEY, Chancellor. Decree that the bill be dismissed. Affirmed.

The defendants were Hiram Putnam, Sarah B. Farr, J. P. Lamson, and Mrs. J. P. Lamson.

On January 9, 1877, the orator, being a son of Hyrcanus Farr, was appointed his guardian by the Probate Court, and he remained such until the death of said Hyrcanus, August 17,

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1878. Soon after the decease of said Farr, the defendant Putnam was appointed administrator of his estate; and on October 29, 1878, commissioners to adjust claims against the estate were appointed. In 1840 the defendant, Sarah B. Farr, was married to one Ruscoe; and they lived together as husband and wife for about four years, when he deserted her and went to parts unknown. In 1852 a marriage ceremony was performed between the said Hyrcanus and said Sarah B., she believing that said Ruscoe was dead. And the said Hyrcanus and Sarah B. lived together as husband and wife until his death, both thinking that she was his lawful wife; and what property he left at his death was acquired by the united exertions of both. But the said Sarah B. was mistaken and said Ruscoe was alive and resided in Canada. The said Hyrcanus had no children by the said Sarah B., but had a large family of children by a former marriage. After their marriage, said Hyrcanus and Sarah B. lived in Woodbury for about five years, and then they moved to Cabot, having purchased a farm situated in Cabot and Woodbury, and lived on this farm till September 7, 1876. On that day they left said home for the purpose of visiting his children in Stannard and Craftsbury. When they left they intended to be absent only two weeks, and their sole object was to visit their friends. For some two years prior to this time, the said Hyrcanus had been occasionally afflicted with epileptic fits, and was physically and mentally somewhat impaired. Within an hour after reaching the home of the orator, in Craftsbury, said Hyrcanus had a severe fit, and was also stricken with paralysis. For a day or two he was unconscious, and remained helpless until his death.

After the paralytic shock, he occasionally had fits, and would be out of his head for a while, and then recover his consciousness, but was mentally and physically quite weak. The said Hyrcanus was not in a condition to be removed to his home in Cabot, and so remained with his son, the said Oliver W. Farr,

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until his decease. During the last six months of his life he was without his reason. The said Sarah B. remained at the orator's house during the sickness of said Hyrcanus, and went to Cabot at the time of his burial, and remaining there some weeks, she returned to Craftsbury. After a short time she went back to Cabot, and worked out at different places until the homestead was set out to her from the old farm, on the 20th day of November, 1880. The farm was rented to one Yaw while the said Hyrcanus was sick in Craftsbury; but the master found that, if he had been "able to return to his old home, he and the said Sarah B. would have so returned."

"I do not think that, at the time of said agreement to lease to Yaw, Hyrcanus had decided to permanently abandon his old homestead, as and for a homestead, but he was at that time satisfied he would not for the term of the lease be able to return; and that he then had reason to believe, and did believe, there were grave doubts as to his ever being able to return to Cabot."

The first meeting of the commissioners was at the orator's house, January 7, 1879. The defendants, Putnam and J. P. Lamson, Esq., an attorney, representing certain creditors, were present. The orator and said Putnam and Lamson finally agreed that the orator should be allowed \$750 for "keeping ward and wife, and services of self and family, caring for same two years." The next day the orator settled his guardianship account with the Probate Court, and said account was allowed at \$750. Immediately after the orator was appointed guardian, January 9, 1877, he took possession of the ward's property and had control and management of it until the ward's decease. The master found as to surrendering of possession of the property to the administrator by the guardian as follows:

"It is claimed by the defendants that it was agreed at that time that the amount allowed orator by the Probate Court, on the basis of an allowance of \$750 for board and care as before



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stated, should be treated as a common debt, and that he should share with the other creditors in the estate. Still, the defendant Putnam admitted upon the stand that he always supposed the orator was to be paid the amount due him as guardian after payment of charges for settlement of estate and amount allowed the widow, and before other creditors were paid. I am unable to find that said Oliver ever understandingly agreed to stand in common with the other creditors so far as his guardian account was concerned, but I do find that he always supposed and expected his guardian account would be paid first, and in preference to other claims.

\* \* \* "At the time of the settlement of said guardian's account, it was ascertained that there was considerable personal property on-hand, the property of said estate, in the possession of said orator. And the farm at Cabot and Woodbury was still unsold and a part of said estate.

"After the expiration of Yaw's term, under his lease of the Cabot farm, the orator, as guardian, leased it to one Henry Wheeler, to carry on at the halves, who was in possession of said farm at the time of the death of said Hyrcanus. Some little time after the decease of said Hyrcanus, appraisers were appointed on his estate. Certain of the personal property of said estate was at the orator's in Craftsbury, and the balance at the old homestead in Cabot. The orator was with the appraisers at Craftsbury when they were in the discharge of their duty, and pointed out the property there belonging to said estate, and was also with them when they appraised the personal property and farm at Cabot.

"Said Wheeler was on the Cabot and Woodbury farm at the time the appraisers were there to appraise the property. Wheeler remained on said farm through the winter following the death of the old gentleman, under an arrangement made with the administrator, Putnam, to stay and feed out the hay, and take care of the stock; and in the spring of 1879 said administrator rented said farm to Jacob Farr, one of or-

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ator's brothers, and said Jacob Farr paid for the rent of said farm to said administrator. The orator knew this, and made no objection thereto.

“The administrator took possession of the personal and real estate of the intestate, and this was done with the consent of the orator. But I find that the orator, at the time the administrator took such possession, understood and expected that said administrator was going to sell said property, and from the avails thereof he was first to be paid in full the amount allowed him in the settlement of his guardian account. The administrator supposed and expected that would be the result; but he did not feel authorized in paying said allowance till so directed by the Probate Court, and he never made any effort for such an order by said court.”

In the fall of 1880, Sarah B. petitioned the Probate Court for the appointment of commissioners to set out a homestead and dower from the premises belonging to said Hyrcanus at the time of his decease.

The commissioners, on the 20th day of November, 1880, set out a homestead to Sarah B. Farr from said premises, and returned their report and warrant into the Probate Court on the 27th day of December, 1880, and the report was accepted and ordered recorded.

The orator had no knowledge of such proceedings until after the report of the commissioners had been returned to the Probate Court and accepted by it; but he did learn of the proceedings in time to take an appeal from the decree and order of the court. The appeal was allowed and duly entered in the County Court for Orleans County, at the February Term, 1881, and continued to the September Term, 1881. At this term, defendant Putnam was dismissed as an improper party, and it was ordered and adjudged by the court that the decree of the Probate

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Court be affirmed ; and the cause was ordered to be certified back to the Probate Court. The master found :

“ The orator offered testimony tending to show that there was no trial in said cause, that no issue was formed therein, but that said judgment was rendered by the court without any trial.

“ The defendants objected to the admission of such testimony for the reason that the orator is bound by the record ; and that such testimony is immaterial and incompetent, and an attempt to collaterally impeach a judgment of a court of competent jurisdiction, and does not tend to establish any issue made by any of the pleadings.

“ I deemed it best to and did admit the testimony subject to the objection and exceptions by defendants. I find from the testimony thus admitted that, at said last-named term of Orleans County Court, the orator in this suit, being the plaintiff in that cause, filed an affidavit for a continuance of said cause to the next term of said court ; and there was a hearing upon that question, and the court refused to continue the case. The said Farr's counsel announced that he could not try the case, and the court thereupon rendered judgment as hereinbefore stated.

“ The judgment so rendered and ordered to be certified to the Probate Court was so certified, and the certificate thereof was filed in the Probate Court on the 21st day of December, 1881.”

The warrant issued to the commissioners commenced :

“ Whereas Hyrcan us Farr, late of Craftsbury, in said district, deceased, inestate, died seized and possessed of the following described real estate, to wit : It being the home farm where the said Hyrcanus Farr last resided in said Cabot, containing about 160 acres of land, said land being situated in the towns of Cabot and Woodbury, in said county, and out of which Sarah Farr, the widow of said deceased, is entitled to a homestead, and said widow is also entitled to dower ; therefore by the authority of the state of Vermont, you are hereby appointed commis-

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sioners, and authorized to appraise all the real estate whereof said deceased died seized. \* \* \* When you have completed your inventory, you will then proceed to set out from the dwelling-house, out-buildings, and lands used in connection therewith, and used and kept by said Hyrcanus Farr at the time of his decease, as a homestead, to said Sarah Farr," etc.

As to the administrator's account it was found that it came under the consideration of the Probate Court after due notice, on the 13th day of July, 1881; that although no one appeared to object, at the request of the orator, it was continued to October 26, 1881, and was again continued till December 27, 1881, when said account was examined, sworn to, allowed and ordered recorded, and is as follows:

"Hiram Putnam, administrator of the estate of Hyrcanus Farr, late of Craftsbury, deceased, in account with said estate.

	To the estate,	Cr.
To amt. of real estate and personal property as per appraisal,.....	\$2,538	53
To cash received for property not appraised,.....	13	50
To income from real estate,.....	113	10
	<b>\$2,665</b>	<b>13</b>
	To the same estate,	Dr.
By homestead set to widow out of real estate,.....	\$	500 00
By shrinkage on appraisal, as per Schedule A,.....	1,212	97
By household goods assigned to widow,.....	129	12

\* \* \* Then this account was examined and sworn to, the question of its allowance being continued, awaiting the result of a matter pending in Orleans County Court.

Attest, O. H. AUSTIN, Judge."

After the homestead was set out to the said Sarah B. Farr, the administrator, having obtained license to sell the real estate of his intestate, advertised for sale, and sold, at public auction, all the residue of the real estate of which the intestate died seized, to the said Sarah B. Farr, for the sum of \$400, she being the highest bidder for the same.

And, in accordance with said sale, said Putnam, as such ad-

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ministrator, under his license aforesaid, executed a deed of the same to the said Sarah B., and she paid him therefor.

And all the personal property belonging to the estate of the said Hyrcanus, which had not previously been disposed of, was sold at time of said auction. The orator knew that the administrator, Putnam; had applied for, and obtained, a license to sell all the real estate of which the said Hyrcanus Farr died seized, a long time previous to the time said homestead was set out; but he, at all times, claimed he must be paid in full the amount of his guardian account from the avails of the property of which the said Hyrcanus died seized.

At the time the defendant Sarah B. bid off the balance of the said premises for \$400, she was in need of funds with which to pay for the same, and she applied to the defendant Abbie A. Lamson for a loan of said money. Mrs. Lamson had money which she held in her own right and passed over to her husband, J. P. Lamson, a check for the money required by the said Sarah B., and he obtained the currency therefor. At the time the administrator deeded said real estate, so sold at auction, to the said Sarah B., the said J. P. Lamson, acting for and on behalf of his wife, passed over to the said Sarah the sum of \$430. And Mrs. Farr therefore, on the 20th day of April, 1881, executed and delivered a mortgage of said premises, including the homestead, to Mrs. Lamson, to secure the payment of said sum of money, as specified in two promissory notes then executed and delivered to said J. P. Lamson for his said wife.

The prayer of the bill was that defendants be foreclosed from all right in the said estate unless they paid the said \$750.

*L. H. Thompson*, for the orator.

The orator having been appointed guardian of Hyrcanus Farr under the provisions of Rev. Laws, ss. 2436 and 2438, until legally discharged from that appointment, had the possession and management of the estate of his ward, the care and custody of his person, and the care and custody of such mem-

bers of his family as were dependent upon said ward for support. Rev. Laws, s. 2445; *Waterman v. Wright*, 36 Vt. 165.

By his appointment as guardian, the orator became a trustee, and thereby assumed the liabilities, and acquired the legal and equitable rights, of a trustee as to his ward's estate. Rev. Laws, ss. 2447, 2285; 3 Pom. Eq. Jur. ss. 1088, 1097.

As trustee or guardian, the orator had an equitable lien upon his ward's estate, which took precedence of all other claims against the estate, and all persons taking said property with knowledge of said orator having been guardian, took the same subject to his lien. See Perry, Tr. (1st ed.) ss. 907, 910; Schoul. Dom. Rel. pp. 464, 465; 2 Pom. Eq. Jur. s. 1085; *Rensselaer & S. R. Co. v. Miller*, 47 Vt. 152; *Field v. Wilbur*, 49 Vt. 165.

The defendant Abbie A. Lamson had constructive notice of orator's rights by virtue of proceedings in Probate Court. Again, she cannot stand as an innocent purchaser for value without notice, as she had actual notice; as her agent, attorney, and husband, J. P. Lamson, who acted for her, had full knowledge at the time of taking her mortgage of the equitable lien of the orator on said real estate. Story, Ag. ss. 140, 140 a; *Hart v. Farmers & M. Bank*, 33 Vt. 253.

A widow takes a homestead by operation of the law, which says that on the death of a housekeeper or head of a family leaving a widow or minor children, "his homestead *shall pass to and vest* in such widow and children." Rev. Laws, ss. 1898, 1899.

The widow takes the homestead by virtue of her relation as wife to the deceased, the same as she does dower which does not depend on the contingency of dower being set out. *Dummerston v. Newfane*, 37 Vt. 13; *Johnson v. Johnson*, 41 Vt. 467; *Grant v. Parham*, 15 Vt. 649.

The setting out of a homestead is a proceeding to sever and partition, and not to give title. If no title or homestead ex-

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ists, the proceeding goes for nothing. Rev. Laws, s. 1970; *Grice v. Randall*, 23 Vt. 243; Freem. Judg. s. 304.

The orator is not estopped by the judgment in the homestead proceedings. Freem. Judg. s. 276, 281, 303.

The orator lost none of his rights by permitting the defendant Putnam to take possession of the property. The power of the orator to dispose of the property by sale or otherwise was terminated by the death of his ward. The Probate Court could give him no power to sell the same and satisfy his claim. He stood as a mortgagee of the property, and if the administrator did not pay him he must bring his suit in equity to enforce his lien. Of course it would have been different if the estate of said ward at his death had been in money instead of chattels and real estate. It seems that the administrator without the consent of the orator had a right to take possession of said property and hold the same subject to the orator's lien.

He stands as a mortgagee of the property he is pursuing. The right under a mortgage is not affected by the setting out of a homestead. *Goodall v. Boardman*, 53 Vt. 92.

But Hyrcanus Farr was not legally married, and at his decease was not a housekeeper or head of a family, and hence left no homestead. R. L. s. 1894; *Bugbee v. Bemis*, 50 Vt. 219.

The Court of Chancery has jurisdiction. 3 Pom. Eq. Jur. ss. 1088, 1097; 1 Pom. Eq. Jur. s. 100; *Harris v. Harris*, 44 Vt. 320; *Field v. Torrey*, 7 Vt. 372.

*J. P. Lamson and Bates & May*, for the defendants.

If the orator had any equitable lien at the time his father died, he lost it by voluntary delivery of property to Mr. Putnam, as administrator, to be administered as assets of the estate. *Richardson v. Merrill*, 32 Vt. 27.

The orator is estopped from asserting his present claim. *Stone v. Fairbanks*, 53 Vt. 145.

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The guardianship ceased on the death of the ward, and it was the duty of the orator then "to pay over and deliver the estate and effects remaining in his hands \* \* \* to persons entitled to same," namely, the administrator. 3 Redf. Willis, p. 457, s. 56; Rev. Laws, ss. 2447, 2488.

The Probate Court has jurisdiction of the appointment, power, duties, and rights of guardians and wards, and settlement of estates. Rev. Laws, s. 2018; *Lathrop v. Hitchcock*, 38 Vt. 49; *Boyden v. Ward*, 38 Vt. 628; 22 Vt. 50.

The decree of the Probate Court, affirmed by the County Court, as to the homestead of Mrs. Farr, concludes the orator, both in law and equity. *Atwood v. Robbins*, 35 Vt. 530; 32 Vt. 472; 18 Vt. 77; 11 Vt. 148; 34 Vt. 365; *Leach v. Leach*, 51 Vt. 440; 3 Vt. 400; 16 Vt. 313; *Grice v. Randall*, 23 Vt. 239; *Stone v. Peasley*, 28 Vt. 716; *Lenahan v. Spaulding*, 57 Vt. 115; *Caujolle v. Curtis*, 80 U. S. 13 Wall. 465 (20 L. ed. 507); *Roderigas v. East River Sav. Inst.* 63 N. Y. 460; *S. C.* 20 Am. Rep. 555; *Gates v. Treat*, 17 Conn. 392; Freem. Judg. 256, 272, 313; Thomp. Homesteads, s. 614; 38 Tex. 491; 6 Cal. 234; 2 Bish. Marr & D. 765; 34 La. 805; 48 Mo. 560; 17 Ind. 183; Freem. Judg. s. 319a.

The guardian had no right to sell the real estate. Rev. Laws s. 2477.

If he had such license the wife must join. Rev. Laws, s. 1910.

The real estate of Hyrcanus was never charged to the guardian and was never under his control. *Munroe v. Holmes*, 9 Allen, 244; 13 Allen 109.

There is no such equitable lien, as claimed by orator in this case. 1 Story, Eq. Jur. s. 506, *et seq*; 2 Story, Eq. s. 1216; Schoul. Exrs. s. 264.



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But if the unpaid balance is to be treated as a lien upon the property, it should not be paid before the reasonable, necessary expenses of administration are satisfied. 2 Story Eq. Jur. s. 1246.

The case of *Pingree v. Goodrich*, 41 Vt. 47, seems to be a full and complete answer to orator's claim.

In order to render the orders and decrees of the Probate Court void, it must appear upon the face of the record that the court has proceeded in a manner prohibited or not authorized by law. *Probate Court v. Winch*, 57 Vt. 282. See *Byram v. Byram*, 27 Vt. 295; *True v. Morrill*, 28 Vt. 672.

The orator can reach this balance in the hands of the administrator by applying to the Probate Court, and, if dissatisfied, by appeal. *Davis v. Gaines*, 104 U. S. 386 (26 L. ed. 757); *Rorer*, Jud. Sales, s. 470.

The decree of the Probate Court allowing \$172.12 to Mrs. Farr was final. *Richardson v. Merrill*, 32 Vt. 27; *Leach v. Leach*, 51 Vt. 440; 3 Vt. 400, 16 Vt. 313. See *Probate Court v. Van Duzer*, 13 Vt. 135.

The opinion of the court was delivered by

ROWELL, J. Before and at the time of the death of Hyrcanus Farr, an insane person, on August 17, 1878, the orator was his guardian.

By his bill the orator seeks to subject his ward's estate in the hands of the administrator and of the other defendants as far as they have had to do with it, to a first charge or lien for the payment of the balance found due him on settlement of his guardianship account in the Probate Court on January 8, 1879. The bill goes upon the ground that in the orator's hands his ward's property was chargeable with the payment of what was due him as guardian, but that the property was unlawfully and against his will taken from his possession by the administrator,

and therefore is still chargeable in his favor by way of an equitable lien or mortgage, for the foreclosure of which he prays.

But the findings of the master do not sustain the allegation that the property was taken from the orator unlawfully and against his will. On the contrary it appears that the administrator took it with his consent, though with an understanding and expectation on his part that it would be sold and he paid from the proceeds. And the administrator expected the result would be that he would be thus paid, but he did not feel authorized to make payment without an order of the Probate Court, which he has never attempted to obtain.

It also appears that the orator was with the appraisers when they appraised the property of the estate, and pointed out some of it to them; that before the property was sold he knew the administrator had obtained license to sell the real estate; and that at one time he bargained with the administrator to buy the whole estate for \$1350, but the trade fell through. During all this time it does not appear that the orator claimed any lien on the property, but only, when he said anything about it, that he should be first paid out of the proceeds.

The orator concedes that if he never had a lien on the property, or if he had one and has lost it, he cannot maintain his bill. Now, without undertaking to say whether he ever had a lien or not, we think if he ever had one he has waived and lost it. See what he has done. Every thing shows that he did not intend to retain a lien on the *corpus* of the property itself in the hands of the administrator; for he consented to let it go into his hands, supposing and expecting he would sell it in due course of administration. And his consent was not, as claimed, on condition that he should be paid from the proceeds, but was unconditional and absolute. How then can it be said that he intended to retain a lien on the property? It is clear that he did not so intend, not even as to the home-

stead, for that went into the hands of the administrator with his consent with the rest of the estate and with the same expectation on his part that he was going to be paid out of the avails of the property sold, and at that time the estate appeared to be ample, aside from the homestead, to pay him, if he was to be preferred to other creditors, and that was what he expected, and he then neither claimed nor expected anything else; but now, the estate having been all sold, except the homestead, and converted into money, it transpires that by reason of the depreciation of the property in value from the appraisal there is very little left of the avails with which to pay any body. This makes the idea of setting up a lien on the property look very much like an after-thought on the part of the orator, conceived when in the course of events a necessity for it seemed to arise.

We have not inquired whether the orator has a superior right to be paid out of the avails of the property; for if he has he cannot assert it under his bill as drawn, certainly, if he could by a bill properly drawn and against proper parties.

This renders it unnecessary to consider the other points made in argument.

*Decree affirmed and cause remanded.*

JOHN A. WORTHEN & SON v. JOHN G. PRESCOTT.

*Absconding Debtors. Recognizance. Bail. Scire Facias.*

R. L. ss. 942, 1468, 1478.

1. In assumpsit, where the writ issued under the statute—R. L. s. 1478—as a *capias* against an absconding debtor, the defendant was bail for the debtor, and, on the return day, surrendered him into court, and was discharged. The justice of the peace before whom the case was pending, after a rendition of judgment and a partial hearing as to the debtor's situation and property, continued the case at the debtor's request for a further hearing in this respect and at the same time, took the defendant's recognizance for his appearance; *Held*, (a) That the recognizance was valid; (b) That it was valid although larger than the judgment; (c) That the defendant could surrender the debtor in discharge of himself.
2. The defendant was the same as special bail, or bail above, at common law; and he could at any time or place, without a bail-piece, have apprehended the debtor, even on Sunday, or in his dwelling, or in another jurisdiction. In law he was the debtor's jailer.

SCIRE FACIAS on a recognizance. Heard on demurrer to the declaration, December Term, 1886, Orange County, WALKER, J., presiding. Demurrer overruled and declaration held sufficient. Affirmed.

It was alleged that the plaintiffs on the 29th day of December, 1885, commenced an action of assumpsit against one Morey; that the writ was made returnable before E. R. Aldrich, a justice of the peace, on the 27th day of February, 1886; that the agent and attorney of the plaintiffs filed with

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the justice, before the issuing of the writ, an affidavit, in due form of law, stating that he had good reason to believe, and did believe, that said Morey was about to remove or abscond from the state, and that he had money or other property secreted about his person or elsewhere to an amount exceeding \$20; that judgment was rendered by the justice in favor of the plaintiffs on said 27th day for the sum of \$134.83 damages, and \$4.72 costs; that the original writ was issued against the defendant's goods, chattels, etc., and, for want thereof, against his body, and was served by a constable who arrested the body of said Morey, and that said defendant, Prescott, become bail and surety for his appearance, etc.; that said Prescott delivered his principal, said Morey, at the time of the trial, into court in discharge of himself, and that he was discharged by the court; that on said 27th day, after judgment had been rendered, said Morey submitted himself to be examined on oath as to his situation, circumstances, and property, in accordance with the statute; that, after said Morey had been partially examined before said justice, on application of said Morey, the case was continued to the 8th day of March, 1886, for a further hearing and examination; that said Prescott became surety before said justice, in the sum of \$200, for the personal appearance of said Morey on the continuance day, and in default thereof that he should satisfy said judgment; that said Morey did not appear; that the justice adjudged that he was not entitled to the poor debtor's oath, and that said bail and recognizance of said Prescott be forfeited in due form of law; that execution was legally issued and returned by the officer; that he found neither the body nor estate of said Morey.

*A. M. Dickey*, for the defendant.

The justice had no common-law right to take such recognizance; all his powers in this respect are statutory; and the statute confers no such authority.

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If s. 1469 applies, then the surety must be upon the original writ. Rev. Laws, s. 1407, provide that a justice may take a recognizance in case of judgment against an absent defendant. *Abells v. Chipman*, 1 Tyler, 377.

The statute provides that the officer shall give the bail a bail-piece, and with that the bail may take his principal anywhere and bring him into court; but in this case there is no provision for a bail-piece. This is sufficient to show that the recognizance is not valid. In all other cases the statute makes provision for bail, but none here. *State v. Lamoiné*, 53 Vt. 568; *Strong v. Edgerton*, 22 Vt. 249; 2 U. S. Dig. 220; 35 Vt. 565; 11 Vt. 349.

The justice had no authority to declare the recognizance forfeited. The case had been adjourned before the recognizance was entered into. *Converse v. Washburne*, 43 Vt. 129.

The recognizance was void because taken larger than the judgment. 3 Ga. 128; 2 U. S. Dig. 423; *Washburn v. Phelps*, 24 Vt. 506.

*John H. Watson*, for the plaintiffs.

The defendant first became bail by indorsing his name on the back of the writ as provided by Rev. Laws, s. 1461. He then delivered his principal into court in discharge of himself. Rev. Laws, s. 1468. Final judgment was rendered against Morey, and thereupon he submitted himself to be examined on oath "as to his situation." Rev. Laws, s. 1488.

The hearing was properly continued. S. 1489.

The defendant became bail according to the provisions of s. 1489 of the statute. The case was still pending (*Chase v. Holton*, 11 Vt. 347), and the bail was properly taken.

The opinion of the court was delivered by

ROWELL, J. This is *scire facias* on a recognizance entered into by the defendant for one Morey before a justice. The declaration is demurred to, which brings in question the validity of the recognizance.

The defendant was bail for Morey on a writ issued as a *capias* against him in an action of assumpsit in favor of the plaintiffs, and on the return day he surrendered his principal into court in discharge of himself, and was discharged. Such proceedings were thereupon had in the case that judgment was rendered against Morey for \$139.55, damages and costs; whereupon, and within two hours from the rendition of judgment, Morey submitted himself to be examined as to his situation, circumstances, and property, according to the statute in that behalf, and after a partial hearing on that question, the justice, at Morey's request, continued the case nine days for further hearing, and at the same time took the recognizance in question for \$200, conditioned for Morey's personal appearance on the continuance day, and in default thereof, for the payment of the judgment.

The defendant had the right to surrender his principal into court in discharge of himself as he did. R. L. s. 1468; *Abells v. Chipman*, 1 Tyler, 377; *Chase v. Holton*, 11 Vt. 347. The continuance of the case for further hearing on Morey's application to take the poor-debtors' oath, suspended the judgment and kept the case open and in hand until that question was disposed of, and execution could not issue till then. *Chase v. Holton*, 11 Vt. 347. Hence, it was the duty of the court, under section 1469 of the statute, which is unquestionably applicable to justice courts, unless Morey procured bail for his appearance on the continuance day, to order him committed to jail, that he might be had if needed to be taken on execution. And although the statute says that such commitment shall be *deemed* to be a commitment on the original writ, yet it is not so in fact, but only in legal effect, for the original writ is returned into court, and cannot be taken for the purpose of commitment; but the court, if the commitment is to be beyond its then present session certainly, must issue a mittimus, upon which the commitment must be made. This is the course pointed out in 1 Tyler, 377, for a justice to

pursue. From all which it follows that bail like this is not literally taken on the original writ, as the defendant claims it must be; but as the commitment is deemed to be on the writ, the obligation of the bail should be, and in this case by the condition of the recognizance is made to be, co-extensive with that of bail on the writ.

It is strongly urged as a reason why the justice had no power under the statute to take this recognizance, that there is no provision for issuing a bail-piece in such a case, so that the bail is powerless to bring in the principal. But the bail here is the same as special bail, or bail above or to the action, at common law, and the right of such bail to apprehend their principal is not at all dependent upon their having a bail-piece, which is not process nor in the nature of process, but is only evidence that the surety has become bail. At the common law the bail-piece seems not to have been delivered to the person becoming bail, but it was signed by a judge and filed in the court in which the case was pending.

Lord COKE says that "in truth *baily* is an old Saxon word, and signifieth a safe keeper or protector, and *baile* or *ballium* is safe keeping or protection; and thereupon we say when a man upon surety is delivered out of prison, *traditur in ballium*, he is delivered into bayle, that is, into their safe keeping or protection from prison." Co. Lit. 61b. Blackstone derives the word *bail* from the French, *bailler*, to deliver. Some derive it from the Greek, *ballein*, to deliver into hands.

Hence, a defendant who is delivered to special bail is looked upon in the eye of the law as being constantly in their custody. They are regarded as his jailers, and have him always as it were upon a string that they may pull at pleasure and surrender him in their own discharge. They may take him on Sunday, which shows that it is not an original taking, but that he is still in custody. Bac. Abr., tit. Bail in Civil Cases; *Pyewell v. Stow*, 3 Taunt. 425; *Payne v. Spencer*, 6 M. & S. 231.



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They have a right to be constantly with the principal, and to enter his dwelling when they please to take him. *Sheers v. Brooks*, 2 H. Bl. 120.

Their authority arises more from contract than from the law ; and as between the parties neither the jurisdiction of the court nor of the state controls it, and so the bail may take the principal in another jurisdiction or another state, on the ground that a valid contract made in one state is enforceable in another according to the law there. *Nicoll v. Ingersoll*, 7 Johns. 145 ; *Commonwealth v. Brickett*, 8 Pick. 138. This shows that the authority need not be exercised by process, but that it inheres in the bail themselves ; and they may exercise it personally or depute another to exercise it for them. See the cases last cited, and *Pyewell v. Stow*, 3 Taunt. 425 ; 1 Tidd's Pr. 218.

But it is said that the recognizance, being larger than the judgment, is larger than the law requires, and therefore irregular, and that the bail should be discharged on motion. But the statute does not fix the amount of the recognizance in such cases. The recognizance is conditioned for the payment of the judgment in default of the principal's appearance, and so the liability upon it is limited to the amount of the judgment, though the recognizance be for more. R. L. s. 942.

The judgment of the County Court overruling the demurrer and adjudging the declaration sufficient is affirmed ; but as no final judgment was rendered below, the cause is remanded.

## JAMES S. WEED v. J. A. KEENAN.

*Water Course and Water Rights. Prescription. Evidence.*

1. A prescriptive right is as perfect, and has the same validity and force, as one acquired by grant; and its owner cannot be divested of it by his words or acknowledgment.
2. In an action for flowing the plaintiff's land, the defendant claimed a prescriptive right; and it appeared that several years after the permanent structure of his dam had been built, he used a flash-board on it for the purpose of storing water; that the plaintiff's evidence tended to prove that defendant within fifteen years asked a former owner of the land for a license to raise a dam; that one question was whether the conversation as to the license related to the main dam or the flash-board; that the court instructed the jury that, if it related to the dam, and that if the defendant had gained a prescriptive right as to this, he could not be divested of it by what he might say, but if it related to the flash-board, which was first put on only thirteen years before, that it was an acknowledgment of the superior right of the owner of the servient estate and would rebut the presumption of a grant; that the jury returned a verdict for the plaintiff; and, on inquiry by the court, stated that the damages were given in consequence of the flash-board; *Held*, that the result was logical and the verdict valid.

CASE for flowing the plaintiff's land above the defendant's mill-site on the same stream. Trial by jury, Orange County, June Term, 1886, ROWELL, J., presiding. Verdict for the plaintiff to recover \$40.00 damages. It appeared, that the plaintiff purchased his premises of Robert Carruth and his brother; that defendant's evidence tended to prove that he bought his mill property in 1857 and soon after built his present dam across the stream where an old dam had formerly

stood ; that he made the permanent structure of the dam eight feet high ; that in 1867 he began for the first time to use the flash-board eight inches wide on his dam for the purpose of storing the water ; that he used the flash-board not more than six days in a year, on the last of April or first of May. Carruth testified that defendant's conversation with him as to the dam was in June. The other facts are sufficiently stated in the opinion.

*Smith & Sloan*, for the defendant.

To rebut the presumption of a grant, it must appear that the acknowledgment is in regard to the very right which the party prescribes for, or if that question is doubtful, it must be submitted to the jury. *Tracy v. Atherton*, 36 Vt. 503, 520. It is apparent that the parties were not talking about the flash-board, or the defendant's right to use it in April or May ; for the talk was in June.

It is equally apparent that the defendant might well ask leave to raise his dam in June, or to raise it two feet, or for any further use than he had been accustomed to have, for he has never claimed any right *beyond* what he has occupied. And yet such an asking is not inconsistent with the defendant's having the limited right to use the flash-board, and not being inconsistent, cannot rebut the presumption of a grant.

Neither was such asking inconsistent with Carruth's knowledge of such annual custom and of his acquiescence therein.

A grant may be made of a limited right, or for a particular purpose, and the grantee's right to use would be co-extensive with his grant. *Shrewsbury v. Brown*, 25 Vt. 197.

The utmost that can be claimed from the evidence is, that it is evidence *tending* to show that the defendant was not using the flash-board under a claim of right ; and when the court told the jury that any asking of leave to raise the dam was conclusive to rebut any presumption of a grant, it was error.

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Before that evidence as matter of law could rebut the presumption of a grant, it must be found as matter of fact that the defendant conceded that he had no right to what he had been exercising; and yet, the court, without leaving that question at all to the jury, told them that any asking of leave to raise the dam would rebut the presumption, and interrupt the right to use the flash-board, leaving the jury nothing to do but to say whether or not any such talk occurred. 3 Stark. p. 1228.

The sole ground for such evidence being received to rebut the claim of a prescriptive right is that it is inconsistent with such claim. *Watkins v. Peck*, 13 N. H. 360; *Hogg v. Wallace*, 8 Foster, 547; *Arbuckle v. Ward*, 29 Vt. 43; *Tracy v. Atherton*, *supra*.

*R. M. Harvey*, for the plaintiff.

The plaintiff's evidence tended to show that defendant's main dam had been raised from time to time since it was built in 1857, and so the charge was more favorable to the defendant than what he was entitled to, by restricting the effect of Carruth's license to the flash-board.

If the defendant did ask leave of Carruth, who then owned the plaintiff's land, to raise his dam above the eight feet, and thereby acknowledged a superior right in Carruth, then the court said, such an asking, such an acknowledgment, would rebut the presumption of a grant, and interrupt the acquiring of the right to use the flash-board. In this there was clearly no error. *Mitchell v. Walker*, 2 Aiken, 266; *Arbuckle v. Ward*, 29 Vt. 43; 2 Wash. Real Prop. 321, 325; *Watkins v. Peck*, 13 N. H. 360; *First Parish in Medford v. Pratt*, 4 Pick. 222; *Flora v. Carbeau*, 38 N. Y. 111; *Smith v. Miller*, 11 Gray, 148; *Sargent v. Ballard*, 9 Pick, 251, 255; *Wilder v. Wheeldon*, 56 Vt. 344; *Albee v. Huntly*, 56 Vt. 457; *Willey v. Hunter*, 57 Vt. 479; *Partch v. Spooner*, 56 Vt. 583.

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The opinion of the court was delivered by

ROÿCE, Ch. J. We find no error in the charge. The jury were told, in regard to the conversation in evidence between the defendant and Robert Carruth, when defendant asked leave to raise the water or the dam, that if before that time the defendant had acquired the right by prescription to keep his original dam at the height he had kept it, that that prescriptive right would have become so perfected and completed in him by the lapse of the requisite period of fifteen years, that nothing he could say, no acknowledgment he might make, could take away from him that right which had in such way become vested in him. There can be no doubt as to the correctness of the instruction. A right acquired by prescription is in all respects as perfect as one acquired by grant; it has the same validity and force. *Arbuckle v. Ward*, 29 Vt. 43; 3 Wash. Real Prop. (5th ed.) p. 59.

It is claimed, however, that the instruction of the court had effect to take away from the jury the decision of the question whether what was said on this occasion between the defendant and Carruth had reference to raising the permanent structure of the dam or to the use of the flash-boards. We do not so understand it. It was not made to appear that the permanent structure of the dam was raised above the eight feet, the prescriptive height; and the jury were told in substance that if the conversation had reference to any raising of the dam within the limit of the prescriptive height, then it amounted to nothing; for no acknowledgment on the part of the defendant could divest him of that already vested right. "So in that event," the court said, "whatever passed between Carruth and the defendant would have reference to only the flash-board." In other words their talk either had reference to the raising of the dam by the use of the flash-boards above the eight feet, the height of the original structure, or it amounted to nothing.

Then the jury were further told that if the conversation had reference to the use of the flash-boards, then it was an acknowl-

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edgment of a superior right in Carruth, and that "such an asking of leave, such an acknowledgment, would rebut the presumption of a grant, and interrupt the acquiring of any right to use that flash-board on the part of the defendant." There can be no doubt of this. *Mitchell v. Walker*, 2 Aiken, 266; *Wilder v. Wheeldon*, 56 Vt. 344. Authorities might be multiplied on this point, but there is no need of further citations.

Finally, in summing up, the jury were told that it was important for them to determine precisely what transpired between the parties, and whether it amounted to an acknowledgment on the part of the defendant of the superior right of Carruth, remembering that if the defendant had acquired by prescription the right to keep his eight-foot dam, whatever he said could not take away that right, but that if what transpired was during the time that he claimed to have acquired the right to keep his flash-board, which he commenced to put on in 1867, as this conversation was thirteen years ago, he had not acquired the right by prescription as touching the flash-boards. Then the jury were instructed to state in their verdict, if it should be for the plaintiff, whether it was rendered because of the permanent structure overflowing the land, or solely on the ground of the use of the flash-board. The foreman informed the court that the damages were given in consequence of the use of the flash-board. To have reached this result the jury must have made up their minds that the conversation between the defendant and Carruth had reference to the use of the flash-boards, and then following the instructions of the court that such an acknowledgment of a superior right in Carruth would rebut the presumption of a grant, they found that the defendant had not acquired the prescriptive right he claimed to the use of the flash-boards, and so made up their verdict. The result was logical and should not be disturbed.

Judgment affirmed.

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Ann E. Kane's Adm'r v. Russell C. and Frank Garfield.

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## ANN E. KANE'S ADM'R v. RUSSELL C. AND FRANK GARFIELD.

*Tax Sale of Land. Tenants in Common. Evidence. Trespass.*

1. **TENANTS IN COMMON. TRESPASS.** When a town was originally laid out into lots, and all except eight of them were allotted to individual proprietors, and they owned the remainder in common, those who have succeeded to their rights are tenants in common of the lands which were unappropriated; and one of such owners cannot maintain trespass *quare clausum* or trover against his co-tenant for entering upon and removing timber from such lands.
2. **TAX SALE COMP. LAWS, CHAP. 90. EVIDENCE.** The legislature assessed a tax on the lands in a town for highways and appointed a collector and also a committee to expend the tax. The committee expended the tax; and their account was made out, and sworn to before a justice of the peace and then presented to the judges of the County Court, who after examination allowed it. It appeared from the report made by the judges that they found by the oaths of the committee that they had faithfully expended the tax. The statute (Comp. Laws, chap. 90, s. 3) provided that no account should be allowed unless verified by the oath of one or more of the committee; but no form of oath was prescribed. A portion of the unappropriated land incident to the ownership of lot No. 20, which had been allotted, was sold to satisfy the tax; and the question being as to the validity of the sale; *Held*, that, while the statute, which prescribes the sales of land for taxes, is to be strictly, and perhaps literally, followed, it is to receive a reasonable construction; and where no particular form of doing a thing is pointed out, any mode which effects the object with reasonable certainty is sufficient; and that the presumption is that the committee took such an oath as was required by law; and it also appears from the finding of the judges that the account was properly verified.
3. **NOTICE.** The committee filed the original account with the clerk of the court instead of a certified copy, as required by the statute; *Held*, that the purpose of the statute was fully answered, in that it is presumed that the account remained on file, and notice of its nature was thereby given to all interested.

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4. EVIDENCE. GENERAL OBJECTION TO NOT SUFFICIENT. A general objection made to a referee to all the evidence relating to a land tax sale is not available as an objection to a certain paper, which, if admissible, tended to prove that the committee gave the required notice of their intention of presenting their account to the court for allowance.
5. REPORT OF JUDGES CONCLUSIVE. But, the report made by the judges, stating that it appeared from evidence before them that the required notices had been given, is conclusive.
6. COLLECTOR'S BOND. The amount of the tax and not the amount of the account which might be allowed, determines how large the collector's bond should be.
7. COLLECTOR. On the facts reported, there was no error in the proceeding of the collector; or in the notice given to the land owners, that they might work out their taxes.

TRESPASS *quare clausum* and trover. Heard on a referee's report, Caledonia County Court, December Term, 1886, POWERS, J., presiding. Judgment *pro forma* for the plaintiff. No question was made about the title of Ann E. Kane's estate to some five and a half lots in the town of Newark. It appeared from the report that the defendants went upon one or more of the eight lots which were not allotted to proprietors by the original allotment of the town, and cut and carried off a quantity of timber.

The committee appointed by the legislature to expend the tax, made oath before a justice of the peace, on November 30, 1857, that their account was true. The following is a copy of the record made by the judges of the County Court.

STATE OF VERMONT,                    } At a stated session of Cale-  
 CALEDONIA COUNTY, ss.            } donia County Court holden  
 at St. Johnsbury, within and for said county, on the first Tues-  
 day of December, A. D. 1857, the foregoing account of  
 Newark land tax committee against the proprietors and land  
 owners of said town, having been duly filed in the clerk's office  
 of said county on the first day of said court, agreeably to the  
 statute requirement, and it appearing from evidence before us  
 that said committee had given the notices required by law that  
 they should present said account to us for allowance at the



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present term of this court, and no person appearing to object to the allowance of the said account, we proceeded to hear and examine the same, and from the production of the newspapers and other proofs, we find that said committee gave due notice to the proprietors and land owners of said town to pay their respective portions of said tax in labor at the times prescribed by law; and by the oaths of said committee we find that they have faithfully expended said tax as in said account specified according to law. We do therefore approve of and allow said account at the sum aforesaid of one thousand and seventy-seven dollars and sixty-one cents, said tax being assessed by said committee at one thousand sixty-six dollars.

LUKE P. POLAND,	}	Judges of Caledonia County Court.
JAMES D. BELL,		
CHARLES C. NEWELL,		

The referee found as to the notice to the land owners :

“The Newark town records show record of the committee's notice to persons owning land to pay the taxes assessed to them in money or to work out the same in the months of June or July. Also certificate of the town clerk that the notice of said committee was published in the Vermont Watchman, Vermont Patriot, and the Caledonian, three weeks successively, two of said publications being in each paper in the month of March and one in the month of April, A. D. 1857, which certificate of said town clerk, after simply stating that this notice of the committee was published as aforesaid, closes thus: ‘All which nine papers, each paper containing the above advertisement, have this 10th day of March, A. D. 1858, been presented to me by Henry Dolloff for record, and a true copy made by me and carefully examined.

Attest, LAUREN M. SLEEPER, Town Clerk.’”

“The certificate of the town clerk as to these notices does not show that the advertisements were copies of the original notices, but simply that the above was published, ‘the above’ being the record of the notice.

“The defendants put in evidence the copies of the Vermont Patriot, Vermont Watchman and Caledonian, showing the notices of the committee to work out their land tax.”

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The referee also found as to the proceedings of the collector, after quoting sections 6, 9 and 12 of chapter 90, Compiled Laws, whereby the collector was to give bonds, &c.; was to cause his warrant and return of his proceedings to be recorded in the office for recording deeds, &c.; and the lands sold could be redeemed within one year, as follows:

“ The sale was made on the 31st day of March, 1858. The only evidence of compliance with the requirements of section 12th, that a list of lands not redeemed be recorded, &c., is the following record.

‘ STATE OF VERMONT        } Newark, April 27, 1859.  
  CALEDONIA COUNTY, ss.    }

‘ The following is a true list of all the lands which were not redeemed from Hiram Moulton's vendue sale at Newark, in the County of Caledonia, in said State, on the 31st day of March, A. D. 1858, for the sale of lands in said Newark, for the payment of a tax of five cents per acre on all the taxable lands in said town of Newark, assessed by the legislature of said State, in the year 1856 for the purpose of making and repairing roads and bridges in said town.’

Then follows a list of the lands not redeemed and sold at vendue, among which is twelve acres sold to A. P. Taft, of undivided portion incident to the ownership of the lot drawn to the original right of Jabez Gorham.

Following this is the collector's certificate, thus:

‘ I hereby certify that the several rights and parts of land described in the foregoing list were sold at said vendue for the payment of said tax to the several persons described as purchasers, and was not redeemed from said sale by any person or persons before the 30th day of March, A. D. 1859.

Attest,                      HIRAM MOULTON, Collector.’”

Moulton, the collector, executed his deed to Taft, April 6, 1859; and the cutting of timber, complained of, was done in the years 1881-2-3. The other facts are sufficiently stated in the opinion of the court.

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*Bates & May*, for the defendants.

The land sale was correctly conducted. The objection that a certified copy of the account was not filed with the clerk of court, is of no importance. The proof is sufficient, that the committee posted notices of their intention to present their account for allowance. *Brown v. Hutchinson*, 11 Vt. 569; Wade, Notice, s. 1084. The oath of the committee need not appear of record. *Brown v. Hutchinson, supra*. The record of Newark shows a legal notice to the land owners. *Spear v. Ditty*, 8 Vt. 419; *Taylor v. French*, 19 Vt. 49; *Wing v. Hall*, 47 Vt. 182. A different certificate appeared in *Clark v. Tucker*, 6 Vt. 181. The last clause of the document filed April 27, 1859 (list of unredeemed lands) is clearly a clerical error and was not demanded by law. The collector's bond was legal. *Spear v. Ditty*, 8 Vt. 419.

The courts of Vermont and New Hampshire have plainly taken a new departure in reference to tax titles. *Wing v. Hall, supra*; *Wells v. Austin*, 10 At. Rep. 405; s. c. 59 Vt. 157; *Cahoon v. Coe*, 57 N. H. 556; *Isaacs v. Wiley*, 12 Vt. 674.

*Geo. W. & Geo. C. Cahoon* and *A. F. Nichols*, for the plaintiff.

It is a condition precedent to the passing of any title by a tax collector's deed, that all the proceedings of the officers, should be in strict and literal compliance with the requirements of the statute. *Judevine v. Jackson*, 18 Vt. 470; *Sumner v. Sherman*, 13 Vt. 609; *Chandler v. Spear*, 22 Vt. 388; *Spear v. Ditty*, 9 Vt. 282; *Brown v. Wright*, 17 Vt. 97; Rob. Dig. p. 668; Blackw. T. T. p. 34. Such deed is not even *prima facie* evidence of a legal sale. *Powell v. Brown*, 1 Tyler, 285. A tax deed without proof of every essential prerequisite is void. *Richardson v. Dow*, 5 Vt. 9; Blackw. T. T. p. 39.

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The vendue sale of twelve acres to Taft does not give him any title. The first section of chap. 90 of the Compiled Laws was not literally complied with. The second section was wholly disregarded; and so was the third section, requiring the oath of the committee. In sessions matters the facts which are indisputable to the jurisdiction of the court must appear upon the face of the proceedings. *Hewes v. Andover*, 16 Vt. 510. No title passes under a land tax deed, unless the account of the committee has been approved by the County Court as required by statute. *Wing v. Hall*, 47 Vt. 182.

The approval of the account of the committee with the oath "that the labor was faithfully done" &c., was a condition precedent. *Wing v. Hall*, *supra*. Consent cannot confer jurisdiction when it is not given by law; and when the want of jurisdiction appears upon the face of the proceedings, the judgment is void. *Glidden v. Elkins*, 2 Tyler, 218; *Thayer v. Montgomery*, 26 Vt. 491.

The provisions of the statute as to giving notice to the land owners were not complied with. *Judevine v. Jackson*, 18 Vt. 470; *Coit v. Wells*, 2 Vt. 319. The collector did not give a legal bond. It cannot be presumed that the tax to be collected was less than the sum allowed by the court. The amount of the bond is determined by the amount of the rate-bill delivered to the collector. Such a bond as the statute requires, is indispensable to pass title. *Oatman v. Barney*, 46 Vt. 594; Rob. Dig. 671; Cases, *supra*. The collector failed entirely to comply with the provisions of sections 6 and 9. He makes a return that the twelve acres sold Taft, on the 31st day of March, 1858, were not redeemed by any one before the 30th day of March, 1859,—twenty-four hours before the time of redemption expired. *Giddings v. Smith*, 15 Vt. 344; *Bigelow v. Topliff*, 25 Vt. 284; *Wing v. Hall*, *supra*; Rob. Dig. 670 s. 168.

The opinion of the court was delivered by

ROYCE, Ch. J. This was an action of trespass *quare clausum* and trover, and was heard on the report of a referee.

The town of Newark was laid out into seventy-eight lots; sixty-five were allotted to individual proprietors, and eight were unappropriated and were owned in common by the proprietors. The plaintiff's intestate owned five and one-half of the lots that were allotted to the proprietors. The trespasses complained of were committed upon some portion of the unappropriated land.

It is not now claimed that the defendants acquired any title by virtue of the deed from the Mowreys and Cahoon, executed April 8, 1850; but they base their right upon the vendue deed executed by Hiram Moulton, as collector of the tax voted by the legislature of the State at its session in the year 1856 to Andrew P. Taft, Taft having by his deed conveyed the land so conveyed to him by Moulton to the defendant Frank Garfield, March 1, 1883.

The legislature, at its session in 1856, assessed a tax of five cents an acre on all the lands in Newark except public lands, for the purpose of repairing roads and building bridges, and appointed Henry Dolloff, Robert Moulton and Lauren M. Sleeper a committee to expend said tax, and Hiram Moulton collector. A tax of \$14.95 was assessed on lot No. 20, drawn to the original right of Jabez Gorham, and a tax was assessed upon thirty-three acres of the undivided land, as incident to the ownership of lot No. 20. Twenty-one acres of said thirty-three were redeemed, and the tax on the remaining twelve not being paid, said Moulton sold the same at vendue to Andrew P. Taft for \$1.29, and executed a collector's deed of the same to him April 6, 1859.

In *Spear v. Ditty*, 9 Vt. 282, it was said that sales of land for taxes are proceedings *in invitum*; that it is a mode of

transferring title by operation of law, without the agency of the owner, and that the proceedings are, as conditions precedent, to be strictly, perhaps literally, followed. In *Chandler v. Spear*, 22 Vt. 388, that when the statute under which such a sale is made directs a thing to be done, or prescribes the form, time or manner of doing anything, such thing must be done in the time, form and manner prescribed, or the sale will be invalid. But in determining what is required to be done, the statute must receive a reasonable construction; and where no particular form or manner of doing a thing is pointed out, any mode which effects the object with reasonable certainty is sufficient. And in judging of these matters the court is to be governed by such reasonable rules of construction as direct them in other cases.

These rules have ever since been cited with approval by this court in cases where the validity of such sales has been in question, and are to be observed in the consideration of the objections which have been made to the title of the defendant.

The first objection to the validity of said sale is based upon the requirements of section 1 of chapter 90 of the Compiled Laws, under which the sale was made. That section provides that no lands liable to the payment of taxes shall be exposed to sale for the payment of such taxes, until a fair and correct account of the labor of the committee appointed to expend the same shall have been made out by the committee and presented to the judges of the County Court in the county in which the land is situated, and has been approved by them; and the clerk of the County Court is required to record said accounts. It is claimed that the report of what was done by the committee in this case was not a compliance with the requirements of said section. It appears that such an account was made out and sworn to by the committee, and was filed by the clerk on the first day of a regular term of Caledonia County Court, and was presented to the judges of said court at a term of said court holden on the first Tuesday of December, 1857; and

that said judges, after a full examination of said account, approved and allowed the same at the sum of \$1,077.61. A full report of the doings of said judges was made out and signed by them, and that, with the report of the committee was entered by the clerk of said court in the book in which the records of the current judgments were made, and was duly attested by said clerk as a true record.

It is claimed that said judges had no right to approve of and allow the account presented to them, for the reason that it was not verified in the manner prescribed by section 3 of said chapter 90. That section provides that no articles of account shall be allowed by the judges unless they shall be satisfied by the oath of one or more of the committee that the labor was faithfully done and performed, agreeably to the account which they exhibit. It appears here that the account of this committee was sworn to before its presentation to the judges. No form of oath is prescribed, and the presumption is that they took such an oath as was required by the law under which they were acting. It further appears by the report made by the judges, that they found by the oaths of the committee that they had faithfully expended said tax, as in said account specified, according to law; so that, in our judgment, the account was properly verified.

Section 2 of said chapter requires that all such committees shall leave a certified copy of their accounts, with all the items in detail, with the clerk of the court, to which their accounts shall be presented for allowance, on or before the first day of the term, which accounts shall remain on file in said clerk's office. The obvious intention of that requirement was as a notice to all interested of the nature and kind of account that was to be presented for allowance. That purpose was fully answered by the filing of the original account at the time re-

quired, and it having been filed, the presumption is that it remained on file; so the failure to file a certified copy would not invalidate the proceedings.

Section 2 of said chapter requires that the committee should give notice of their intention to present their account for allowance by posting up notices of their intention at least twelve days before the sitting of the court at which the same was to be presented. The paper found among the papers of Henry Dolloff relating to this land tax sale, and which is copied into the report, had a tendency to show that such notices were posted, if admissible. It must be treated as having been put in without objection. At the hearing, defendant's counsel asked the plaintiff's counsel to point out all the objections they should urge before the court, and no specific objection was made to that piece of evidence. Under such circumstances the general objection made to all the evidence relating to the land tax sale would not be available. The judges, in the report made by them, say that it appeared from evidence before them that the notices required by law had been given by the committee. The duty of ascertaining whether proper notices had been given was imposed upon the judges by the law, and the finding that they had been given was a condition precedent to their right to examine and approve the account, and allow the same, and their finding must be regarded as conclusive.

By section 4 the committee were required to notify the land owners in the manner therein stated that they might work out their respective taxes by applying to the committee. The facts found by the referee show that such notice was given as was required by said section.

The bond which the collector, by section 9, was required to give, was in a sum not less than double the amount of the tax that he was appointed to collect. The amount of the tax was \$1,066., and the bond given was for \$2,150.—an amount more



than double the amount of the tax. The amount for which the bond was to be given was to be ascertained from the tax, and not from the account that might be allowed by the judges of the County Court, and was sufficient. *Spear v. Ditty*, 8 Vt. 419.

The remaining objection was to the proceedings of the collector, as defined by the act. His warrant, return of proceedings, list of unredeemed lands and certificate of the oath taken by him, were all seasonably recorded; and we do not find any such defect in his proceedings as would invalidate the sale. Jabez Gorham was an original proprietor of the town, and the twelve acres sold by the collector belonged to his proprietary right, and the sale being a regular one, Taft acquired a valid title under it. The unappropriated land had not been divided, and so Taft by his purchase became a tenant in common with the plaintiff's intestate.

The defendant Russell C. was an employee of the defendant Frank, and what cutting of timber on said land was done prior to the execution of the deed from Taft to Frank, was done by the consent of Taft. The parties being tenants in common of the land, the plaintiff cannot maintain the action of trespass or trover against the defendants for entering upon the land and doing what it was found was done by them.

The judgment is reversed, and judgment rendered for the defendants.

## STATE v. OMER MILLER.

*Criminal Law.* R. L. s. 4241.

Whether an indictment in the words of the statute is sufficient depends on whether every fact necessary to constitute the offense is charged or necessarily implied from the language used. Thus, where the statute—R. L. s. 4241—provided: “A man with another man’s wife, or a woman with another woman’s husband, found in bed together under circumstances affording presumption of an illicit intention, shall each be imprisoned.” etc.; *Held*, that an indictment which charged that the respondent, “being then and there a man,” was found in bed with another man’s wife, “under circumstances affording presumption of an illicit and felonious intention,” was bad in that there was no allegation as to what the illicit intention was.

INDICTMENT charging respondent with having been found in bed with another man’s wife, etc. Trial by jury, September Term, 1886, Washington County, POWERS J., presiding. Verdict, guilty. Indictment quashed.

The respondent demurred to the indictment; but the court overruled the demurrer, and ordered him to plead without prejudice to the exception.

It was alleged “that Omer Miller \* \* \* was found in bed feloniously together with one Josephine Yatter, under circumstances affording presumption of an illicit and felonious intention, the said Josephine Yatter being then and there a married woman, and having then and there a lawful husband alive other than the said Omer Miller, and the said Omer Miller being then and there a man other than the husband of the said Josephine Yatter, and the said Omer Miller and the said Josephine Yatter not being then and there lawfully married to each other.”

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*Pitkin & Huse and C. H. Heath, for the respondent.*

With the exception of the word “feloniously,”—evidently used because of Rev. Laws, s. 4334,—each count follows and uses these words of the statute; namely, “found in bed together under circumstances affording presumption of an illicit intention;” and there is no other allegation as to intent. The word “illicit” means what is unlawful or forbidden by the law. Bouv. L. Dict.; Webster, Dict. But the statute in Rev. Laws, s. 4241, must by construction have a specific application narrower than the general words; for it is clear that the “illicit intention” contemplated by it can be only the intention to have an unlawful sexual connection.

An indictment must state all facts and circumstances necessary to constitute the offense; although an indictment may, generally, lay the offense in the words of the statute, where the statute specifies all the elements constituting the crime the legislature had in view. *State v. Jones*, 33 Vt. 443; *State v. Cook*, 38 Vt. 437; *State v. Daley*, 41 Vt. 564. Yet, where the general terms of the statute must be narrowed by construction, it is not sufficient to follow the words of the statute, but the indictment must correspond as well with the judicial interpretation as with the letter of the enactment. Were it otherwise, all the allegations of the indictment may be true, and still the respondent be not guilty. 1 Bish. Cr. Proc. (2d ed.) ss. 623, 628; *United States v. Pond*, 2 Curt. C. Ct. 265; *State v. Northfield*, 13 Vt. 565; *State v. Day*, 3 Vt. 138.

*E. W. Bisbee, States Attorney, and George W. Wing, for the State.*

The indictment is sufficient. Rev. Laws, s. 4241; Bish. Cr. Proc. s. 77 *et seq.*; Bish. Stat. Cr. s. 167.

The opinion of the court was delivered by

VEAZEY, J. The first exception is to the judgment of the

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County Court overruling the demurrer and adjudging the indictment sufficient.

It is claimed that the indictment was sufficient to meet the case provided for in section 4241 R. L., viz.: "A man with another man's wife, or a woman with another woman's husband, found in bed together under circumstances affording presumption of an illicit intention, shall each be imprisoned," &c.

Each count charges in these words: "Affording presumption of an illicit and felonious intention," being in the words of the statute except the words "and felonious" are added. There is no allegation as to what the illicit intention was.

The rule, as to when it is sufficient to charge an offense in the words of the statute, was stated in *State v. Higgins*, 53 Vt. 191, being quoted from Mr. Pomeroy, and was thus: "Whether an indictment in the words of a statute is sufficient or not, depends on the manner of stating the offense in the statute; if every fact necessary to constitute the offense is charged, or necessarily implied by following the language of the statute, the indictment in the words of the statute is undoubtedly sufficient; otherwise not."

That rule in substance has always been the test applied to indictments in this State. Under it this indictment is insufficient. The word "illicit," as its derivation indicates, means that which is unlawful or forbidden by the law. Bouv. Law Dict.; Webster's Dict. It is not claimed that every illicit intention would warrant a conviction under this statute. It must be a particular unlawful intention. Therefore as the indictment stands all the allegations might be true and the respondent be not guilty. The illicit intention might have been to steal, burn or murder, as well as to have unlawful sexual connection. In *United States v. Pond*, 2 Curt. C. C. 265, CURTIS, J., observed: "This indictment follows the words of the statute. It is sufficient, therefore, unless the words of statute embrace cases which it was not the intention of the legislature to include

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within the law. If they do, the indictment should show this is not one of the cases thus excluded." Mr. Chief Justice MARSHALL, in the case of the *Mary Ann*, 8 Wheat. 380, speaking of an information, said: "If the words which describe the subject of the law are general, embracing a whole class of individuals, but must necessarily be so construed as to embrace only a subdivision of that class, we think the charge in the libel ought to conform to the true sense and meaning of those words as used by the legislature."

As the indictment must fall there is no occasion to pass upon the exceptions taken in the trial.

Exceptions sustained. Indictment adjudged insufficient and quashed. Respondent discharged.

## DANIEL TILLOTSON v. GEORGE PRICHARD.

*Covenant of Warranty, When it Runs With the Land.*

1. **EVIDENCE. POSSESSION.** The payment of taxes assessed on land is neither an act of possession nor evidence of a possessory title.
2. **AMENDMENT.** A declaration counting upon covenants of seizin and right to convey may be amended by a declaration upon the covenant of warranty; for it is only a different description of the original cause of action.
3. **PRACTICE.** Under a reference, it is immaterial when an amendment of pleadings is made.
4. **A COVENANT RUNS WITH THE LAND.** A covenant of warranty runs with the land as an incident to it, although the grantor had neither the legal title nor the possession, when all the grantees have had possession; and the last grantee, who holds through several mesne conveyances, and who was evicted, can maintain an action based upon such covenant.
5. **PRACTICE. STAYING EXECUTION.** And, if in such case the grantor is liable to two actions,—one in favor of his grantee for a breach of the covenant of seizin, and another to his grantee's assignee upon that of warranty, the court can protect his rights by attaching conditions to the judgment, or staying execution.
6. **TRANSITORY ACTION.** An action for breach of covenant of warranty in a deed of land under our statute, is transitory; and the courts of this State, when the grantor resides here, have jurisdiction, although the land is located in another state.
7. **EVIDENCE.** There was no error in allowing a surveyor in testifying to use a plan of the lands in contention, although it was in part a copy of the government survey.
8. **DECLARATIONS OF PARTY EVICTED.** The declarations of the party who evicted the plaintiff, and also of his workmen cutting timber on the land, were admissible to show an eviction.
9. **DAMAGES. LEX LOCI REI SITAE GOVERNS.** In an action for breach of covenant of warranty, where the grantor resided in Vermont, the grantee in New Hampshire, and the land was situated in Minnesota, the construction of the contract, including the rule as to damages, is governed by the law of the place where the land is situated; and, although the plaintiff was entitled to a judgment, yet, the referee having failed to find, as a fact, what that law is, the court declined to presume that it was the same as the law of this State, and re-committed the case for the court below to determine the damages according to the above rule.

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10. **DEED, WIFE OF GRANTER WITNESS TO.** The plaintiff's wife was a witness to the deed; by the law of Minnesota she was competent and could be examined with the consent of her husband; the deed was not objected to on the ground that it was defectively executed; *Held*, that the deed was legitimate evidence to show an assignment of the land to the plaintiff; and *quære* whether a deed defectively executed is not good between the parties.

**ACTION of covenant broken.** Heard on report of referee and exceptions thereto, December Term, 1885, Orange County, ROWELL, J., presiding. On hearing the plaintiff expressly renounced all claims to recover on the covenant of seizin, and relied on the covenant of warranty only. Judgment on the report for the defendant. Exceptions by the plaintiff.

The declarations mentioned in exceptions 23 and 24 were in effect that Reed, Sherwood and Knight owned the land in contention. The other facts are sufficiently stated in the opinion.

*Farnham & Chamberlain and Barrett & Barrett*, for the plaintiff.

I. The defendant's covenant of warranty in his deed to D. F. Tillotson and Dame has come down to the plaintiff: (1). By force of the deeds themselves, independently of either estate in law, or possession in fact. The question is open in Vermont. This rule violates no principle of law. Its reason and justice are incisively set forth by LAWRENCE, Ch. J., in *Wead v. Larkin*, 54 Ill. 489, 499. The only reason against it is, that the covenantors, instead of having a partial title or tortious possession, have none of any sort. On the point of this absurdity, see Rawle Cov. (3d ed.) p. 382, 393; *Spencer's Case*, 1 Smith Lead. Cas. (5th ed.) p. 155; *Martin v. Gordon*, 24 Ga. 536; *Van Court v. Moore*, 26 Mo. 92. (2). By force of the defendant's estate or interest in the land. An assignee can maintain an action on the covenants, "where any interest whatever in the land has passed to him by the assignment, although inferior in quantity to the estate which the deed to the first vendee purported to convey, and terminated by an eviction under a title paramount, accruing subsequently to the assignment," 1 Smith Lead. Cas. 156. An equity of

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redemption is sufficient. *White v. Whitney*, 3 Met. 83; *Beddoe v. Wadsworth*, 21 Wend. 120; *Dickinson v. Holmes* Adm'r, 8 Grat. 353, 402; *Fowler v. Poling*, 2 Barb. 166; *Lewis v. Cook*, 13 Ired. 194; Rawle on Cov. 388 *et seq.*

(3). By force of the right of possession in the defendant at the time of his conveyance, followed by actual possession taken thereunder. The possession was vacant during Prichard's ownership. But he had the right of possession. "Our conclusion is, that where the covenantee takes possession and conveys, the covenant of warranty in the deed to him will pass to his grantee, although the covenantor may not have been in possession at the time of his conveyance. This is the case at bar." *Wead v. Larkin*, *supra*; *Martin v. Gordon*, 24 Ga. 536; Rawle Cov. 388; *Cases supra*; *Dickinson v. Desire*, 23 Mo. 151.

(4). By force of the seizin in fact of D. F. Tillotson at the time of his conveyance to the plaintiff.

(5). By force of the fact that the land itself came to the plaintiff.

(6). By force of the fact that the covenantor's deed, with the subsequent deeds, vested in the plaintiff the legal title to a part of the entire parcel conveyed, and thus created a privity of estate as to the whole which will support the covenant.

II. The measure of damages was the value of the land. *Drury v. Shumway*, 1 D. Chip. 110; *Park v. Bates*, 12 Vt. 381; *Turner v. Goodrich*, 26 Vt. 707; *Keeler v. Wood*, 30 Vt. 242; *Smith v. Sprague*, 40 Vt. 43.

III. The deed was not defective, though witnessed by the plaintiff's wife. Minn. Gen. Stat. Ch. 73, ss. 9, 10; *Morrill v. Morrill*, 53 Vt. 78; Rawle Cov. 182. But the defendant waived the objection.

IV. There was no error in allowing the amendment to the declaration. *Waterman v. Pass. R. R.* 30 Vt. 610; *Boyd v. Bartlett*, 36 Vt. 9; *Wilson v. Widenham*, 51 Me. 566; *Slater v. Rawson* 6 Met. 439; *Haskins v. Ferris*, 23 Vt. 673;



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*Hill v. Smith*, 34 Vt. 235. The defendant waived all amendable defects by joining in the reference. *Waterman v. Pass. R. R. Co.* 30 Vt. 610; *Laport v. Bacon*, 48 Vt. 176; *Cook v. Carpenter*, 34 Vt. 121.

V. The action is not local. *Wilder v. Davenport*, 58 Vt. 642; *University of Vermont v. Joslyn*, 21 Vt. 52; *Clark v. Scudder*, 6 Gray, 122; 6 Gray, 331; *White v. Sanborn*, 5 N. H. 220. If the action were local at common law, it is not under our statute. R. L. s. 899; *Hunt v. Pownal*, 9 Vt. 411; *June v. Conant*, 17 Vt. 656; *Pitman v. Flint*, 10 Pick. 504; 2 Wait Act. & Def. 387; 10 Ohio, 323.

*Heath & Willard* and *J. K. Darling*, for the defendant.

I. The Vermont courts have no jurisdiction. *Clark v. Scudder*, 6 Gray, 122; *White v. Sanborn*, 6. N. H. 220. There are elements in the case which seem to make it peculiarly improper for the courts of this State to attempt to exercise jurisdiction. The questions to be decided are questions of title. The same issue which would be involved in an action of ejectment is involved here and must be decided according to Minnesota law. In case of a judgment against the defendant he is entitled to an order from the court requiring a conveyance to him from the plaintiff of the lands in controversy, (47 Iowa, 284; 3 Vt. 403, 409) which order could not be effectually made by a court of this State.

II. The measure of damages for breach of covenants of warranty is the consideration money with interest. *Moore v. Frankenfeld*, 25 Minn. 540, 542; *Crisfield v. Storr*, 36 Md. 129, 150.

III. The plaintiff's deed is not properly witnessed. His wife subscribed her name as one of the two witnesses. *Morrill v. Morrill*, 53 Vt. 74. The law of Minnesota requires two witnesses. G. S. Minn. p. 792, sec. 7.

IV. The plaintiff cannot recover upon the covenant of warranty. He cannot recover upon the covenant of warranty because no estate passed to which the covenant could attach

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itself. Where no estate passes by a conveyance in which covenants are made, the covenants remain covenants in gross, and the right to sue upon them exists only in the original covenantee. This principle is one of long standing. Cases illustrating it are to be found scattered over the whole history of the law, from the earliest times down to the present. Over and over again the courts have decided that an assignee cannot sue upon a covenant of title unless the covenant attached itself to the land at the time of the grant. A simple analysis of the doctrine that covenants run with the land shows that it contains the above indicated limitation within itself. According to *Spencer's Case* (5 Coke, 16,) they cannot become incident to the land, unless there is something in being to which they can attach themselves at the time of the grant. So that if the grantor had no estate at the time of the grant, the covenants could not become incident to the estate at all. There must "have been a conveyance of some definite estate." 1 Smith Lead. Cas. 153, 154. The remedies which the covenants confer are personal, and unless there is an estate to carry them elsewhere "they are simply covenants in gross, and can only be enforced by the original covenantee and his personal representatives." 1 Smith Lead. Cas. 158. "If the land do not pass, the warranty cannot pass." 2 Lomax, Dig. 277.

"But when the covenant of seisin is broken, nothing passes by the deed, and, the substratum having failed, the covenant of warranty cannot descend to the heir, or vest in the assignee. It cannot run with the land, for none having been conveyed there is none for it to run with." *Hacker v. Storer*, 8 Me. 228.

In *Slater v. Rawson*, 1 Met. 450, the court say: "But to support an action by an assignee, on the covenant of warranty, it is necessary that the warrantor should have been seized of the land; for by a conveyance without such seisin, the grantee acquires no estate; and has no power to transfer to a subsequent purchaser the covenants in his deed; because as no

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estate passes, there is no land to which the covenants can attach." See *Andrews v. Pearce*, 1 Bos. & Pul. N. R. 158; *Martin v. Gordon*, 24 Ga. 536; *Allen v. Wooley*, 1 Black f. 148; *Whitton v. Peacock*, 2 Bing. N. C. 411; *Noke v. Awder*, Cro. Eliz. 417.

An attempt has been made to lessen the value of the English precedents by assailing *Noke v. Awder*, which is one of the earliest cases on the subject.

*Noke v. Awder* has been said by one critic to have been practically overruled by later English decisions, and so the whole doctrine, for which we contend, done away with in England.

It is not true that *Noke v. Awder* has been overruled. It seems impossible that anyone should say so who has made any examination at all of the cases. A person knowing the actual tenor of the decisions, and speaking candidly, could not allege this to be the fact. See *Higginbotham v. Barton*, 11 A. & E. 307; *Whitton v. Peacock*, 2 Bing. N. C. 411; *Brudnell v. Roberts*, 2 Wils. 143.

Further it is held that the doctrine of estoppel has no application in these cases under any state of pleadings, for the reason that there is no privity between the parties. There is no privity of contract because the grantor never made any contract with the assignee of his grantee, and there is no privity of estate because no estate passed. *Carvick v. Blagrove*, 1 Brod. & Bing. 531.

Should the courts of this State adopt the possession doctrine they would place themselves in the very dilemma which the New York court suggested in *Fowler v. Poling*, 2 Barb. 300; for in this State it has been agreed by this court to hold the covenant of seisin to be a covenant of absolute title, satisfied only by perfect title in the grantor at the time of the grant, and that possession in fact is not enough of an estate to satisfy it. *Richardson v. Dorr*, 5 Vt. 9; *Clark v. Conroe*, 38 Vt. 469; *Mills v. Catlin*, 22 Vt. 98.

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The grantor had no possession. *Reed v. Field*, 15 Vt. 672. The doctrine that covenant in such a case as this, does not run with the land, is not a curious and highly subtle one; but it is the rule, that a covenant under any circumstances runs with the land, that is over-refined. Covenants come within the principle that choses in action are not assignable. 1 Pars. Cont. 11.

The opinion of the court was delivered by

TAFT, J. The defendant, George Prichard, conveyed the land in question to Daniel F. Tillotson and Henry Dame, by deed, containing the usual covenants, dated the 4th day of June, 1866; by subsequent deeds of conveyance the interest of Dame passed to Tillotson, and the latter, on the 18th day of May, 1882, conveyed the premises to the plaintiff.

I. At the time Prichard conveyed the premises to Tillotson and Dame, he did not hold the legal title to them, nor did he have possession of the same, unless the payment of taxes constituted possession. The payment of taxes is not an act of possession, and is not evidence of a possessory title. *Reed v. Field*, 15 Vt. 672. Prichard therefore, at the time of his deed, had neither title nor possession.

II. After the conveyance of the land by Prichard to Tillotson and Dame, the latter entered into actual possession of the premises, and they and their grantees in the chain of title continued in possession until the plaintiff was evicted in December, 1882, by Reed, Sherwood and Knight, under an elder and better title. This action is covenant, the original declaration counting upon the covenants of seisin and right to convey. The court permitted an amendment declaring upon the covenant of warranty. The defendant claims that the court had no power to permit the amendment, which is true, if it introduced a new cause of action. Was the cause of action, introduced by the amendment a new one, or a different description of the cause originally declared upon? The original declaration says that the defendant hath not kept his

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covenants, for that he was not lawfully seized and had not good right to sell and convey the premises, and for that Reed and others were the lawful owners and hath evicted the plaintiff and driven him from the possession of said land. The amended declaration adds the fact that the defendant hath not warranted the said premises and for the same reasons alleged in the original declaration. Where the original declaration counted upon the covenant against incumbrances, it was held by this court that an amendment adding a count upon the covenant of warranty was properly allowed. *Boyd v. Bartlett*, 36 Vt. 9. This case justified the ruling of the court below, and we think is correct in principle. The defendant insists there was error for the reason that the amendment was not permitted until after the evidence had been heard by the referee. It has been many times held that judgment should be entered upon the report of a referee, whenever, without changing the nature of the action, the declaration or pleadings could be so amended, as to accommodate them to the facts found by the referee. Rob. Dig. Tit. Reference, I, sub. div. 5, 6, and cases cited. We think under this rule the time when the declaration was amended was immaterial.

III. The plaintiff claims to recover upon the covenant of warranty only. This covenant is one of those that run with the land, and is intended for the benefit of the ultimate grantee in whose time it is broken. *Williams v. Wetherbee*, 1 Aik. 233. Until breach, the covenant passes with the estate by purchase and can be enforced when broken, by the covenantee or his representatives, or, if the estate has been assigned, by the assignee of the covenantee, who claims under the seisin vested in him. Rawle on Cov. s. 213. The covenant attached to a grant does not pass by the deed from the covenantee to his assignee, but only by the land conveyed. It passes not by the form of the conveyance, but merely as an incident to the land; so when the grantee takes no estate under the grant, no assignment of the land by him can transfer it to the

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assignee. As it is not capable of a direct transfer, so as to enable the assignee to maintain an action for its breach in his own name, it cannot pass by the operation of the assignment, for it cannot run with the land which the grantee does not have to convey. And this doctrine, Rawle in his work on Covenants says, prevails generally throughout the United States. In 1 Smith's Leading Cases, 183 in the notes to *Spencer's Case*, 5 Coke, 16, it is stated that in England when nothing but bare possession of the land passes by the conveyance, the covenant does not pass, either by the direct or indirect operation of the assignment. But the tendency of the American cases is to hold that possession is a sufficient estate to cause the covenant to attach to the land, and upon an assignment or transfer of the land by the covenantor to pass to the assignee. Rawle on Cov. s. 233. Possession is an estate that in time may ripen into a perfect title. The defendant's counsel insist that it was necessary that the covenantor, Prichard, should have had possession, that possession in the covenantees was not sufficient to attach the covenant to the land, and that it could not be made to attach by any possession of the covenantees taken by them subsequently to the grant. The referee finds that Tillotson and Dame took actual possession of the premises under their deed from Prichard. The covenant of warranty was of force in their hands by privity of contract, and when they sold the land having taken possession of it under their deed, the covenant attached to the land and passed with it to the grantee. The first time the question whether the covenant passes, as attached to the land, can arise, is, when the covenantor assigns the estate; and if he then has possession of the land, holding it under his deed, why does not the covenant pass with the land? To so hold does no injustice to the covenantor. He is only called upon to make good his covenant.

It is said a grantor may be liable to his grantee in an action for a breach of the covenant of seisin, and to an assignee of the grantee upon that of warranty. Concede this to be true, the court

can properly protect the rights of the defendant in either case, by attaching such appendages to the judgment, or, staying the execution, as will prevent injustice in any event whatever; as was done in *Catlin v. Hurlburt*, 3 Vt. 403. In that case the plaintiff had conveyed the land to Lynde Catlin, and then brought his action on the covenant of seisin. The court giving judgment for the plaintiff ordered stay of execution until the plaintiff procured from Lynde Catlin and lodged with the clerk for the benefit of the defendant, either a quit-claim deed of the premises, or a suitable discharge of the covenant of warranty contained in the defendant's deed to the plaintiff. And see *Blake v. Burnham*, 29 Vt. 437. In case the defendant apprehends any danger from a second action, he can apply to the court, at the time of final judgment, for such orders in respect thereto, as he thinks he is entitled to. Can it be in any manner consistently claimed that the land in question with the covenant did not pass to the plaintiff by virtue of the deed from the defendant? Can he say it is not his deed? He conveyed the land, his grantees took possession of it and conveyed it to the plaintiff. And is not their possession, tortious though it may be against the lawful owner, derived from and under the deed from the grantor? And if so, why did not the covenant pass to them with the possession? We think the covenant passed, as attached to the estate, when the grantees having taken possession under their deed conveyed the premises to the plaintiff. Rawle on Cov. s. 233; *Beddoe v. Wadsworth*, 21 Wend. 120; *Mead v. Larkin*, 54 Ill. 489; *Allen v. Kennedy*, (Mo.) 6 West. Rep. 845; *Fields v. Squires*, 1 Dedy, U. S. C. C. 366.

It may be well, in this connection, to refer to the precedents of the declarations in actions in this State, for the breach of the covenants of warranty. In *Williams v. Wetherbee*, *supra*, the premises had come to the plaintiff through several mesne conveyances, and after the allegation of the conveyance to the plaintiff it is alleged "whereby the plaintiff became seized and

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*possessed* of the premises," it being nowhere alleged that the defendant or any of the prior assignees had ever been in possession of the premises. It was argued under the demurrer to the pleas that the declaration itself was defective in that it did not allege that the plaintiff entered into possession of the premises and was evicted; but the court held that the allegation "whereby he became possessed, etc.," was a sufficient allegation of the possession. In *Beardsley v. Knight*, 4 Vt. 471, after setting forth the execution by the defendant of the deed containing the covenant, and the assignment of the land to the plaintiff by Hatch, the covenantee, it is alleged that Beardsley, the plaintiff, and assignee of the covenant, entered into possession of the premises, without any allegation that Beardsley the covenantor, or Hatch the covenantee, was ever in possession of the same. In *Wilder v. Davenport's Estate*, 58 Vt. 642, an action for the breach of the covenant of warranty in favor of an assignee of the covenant, Davenport, when his deed was given, was not in possession of, and had no title to, the land. He deeded, with covenant of warranty, to Potter, the latter in like manner to Booth, who subsequently quit-claimed to the plaintiff, Wilder. Judgment was rendered in the Supreme Court for the plaintiff. It is true that the question now under consideration was not raised in the above cases; but it can hardly be supposed that it would have escaped the attention of the able counsel engaged, had they regarded it as a tenable one. The cases indicate how the question has been regarded heretofore by the bar in this State; for if possession by the covenantor had been necessary to cause the covenant to attach to the land, it would no doubt have been so alleged in the declaration; and if not so alleged, the declaration would probably have been met by a demurrer.

IV. The defendant contends that this court has no jurisdiction of the action; that it is local and can only be maintained in the state where the land lies. Such, undoubtedly, was the rule at common law. By that law, if the action for the breach of a covenant was founded upon *privity of contract* it was



transitory; *e. g.*, covenant between the original parties; but if upon *privity of estate*, it was local. By this rule, all actions brought by the assignee of an estate conveyed with covenants running with the land, against the covenantor, to enforce such covenants, were local. In covenants concerning land, an assignee of the land is a stranger to the personal contract between the parties thereto; he is not privy to it; and the only right he has to maintain an action in his own name for their breach, is upon those covenants which “run with the land,” or in other words, those which *follow the interest demised*; and hence the action is said to be founded upon *privity of estate*. It is when the right or obligation created by the covenant is attached to the interest conveyed or to the estate out of which it is created, so that the right or obligation upon an assignment of the estate, devolves upon the assignee. Goulds Pl. Chap. III. s. 118, div. 2; Chitty Pl. 270. But it is argued that the action is local, for that in case of a judgment against the defendant he is entitled to an order from the court requiring a conveyance to him from the plaintiff of the lands in controversy, and the order could not be effectually made by a court in this State; and cite the cases of *Catlin v. Hurlbut*, *supra*, and *Shorthill v. Ferguson*, 47 Iowa, 284. We do not say that the defendant is entitled as matter of right to such an order. The latter case was in equity and the court held that before it would enter judgment for the plaintiff he must tender a conveyance of the land to the defendant; the same result being reached in the other case cited, by stay of execution. The judgment of the court in such cases does not effect the title to the land, by any direct action or process, against the land itself; but the court having obtained jurisdiction of the person of the owner it may, in a proper case, decline to enter judgment, or, it may stay execution after judgment, until he make such conveyance as justice requires him to do, as a condition of obtaining judgment and execution. Indeed cases in equity go much farther. Rorer on Int. St. Law 207, 211. The judgment in no way affects

the real estate; it is *in personam*, sounding in damages only. But it is enough to say that the common law, as to certain actions, including the one at bar, being local, has been superseded by our statute, regulating the places in which actions shall be brought, and none are local unless made so by statute. *Hunt v. Pownal*, 9 Vt. 411; *June v. Conant*, 17 Vt. 656; *Univ. of Vermont v. Joslyn*, 21 Vt. 52. This action by our statute is transitory.

V. The defendant filed sixty-two exceptions to the report of the referee. Except those numbered 15, 18, 22, 23, 24, 31, 33, 37, 43, 48, 51, and 52, they are either waived or rendered immaterial by the disposition of questions already made. Nos. 15, 18, 22, and 43 relate to a plan of the land, made by a surveyor, and used by him when testifying. There was no error in permitting its use. The main reason urged against its use, is, that it was in part a copy of the government survey. This did not render it objectional, but rather tended to add to its correctness. It was made by the witness from surveys of the government and his own observations. Such plans are constantly used in trials and oftentimes are of great service. The exceptions Nos. 23 and 24 relating to the declarations of Reed, Sherwood and Knight and their workmen on the land, in the year 1882, we think were legitimate evidence to show an eviction of the plaintiff.

We have not been furnished with a copy of the testimony of Tillotson referred to in exceptions Nos. 31, 33, and 52, nor the depositions or copies thereof referred to in Nos. 37, 48, and 51, therefore are unable to say that there was any error in the referee's rulings. This disposes of the exceptions to the report, relied upon at the hearing.

VI. The deed of Daniel F. Tillotson to the plaintiff purporting to convey the land in question, and under which the plaintiff claims that the covenant of warranty came to him, was executed in the presence of two witnesses, one of whom was

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the wife of the plaintiff. The defendant claims it was not properly executed. The law of Minnesota required two witnesses to the execution of a deed. Gen. Stat. Minn. 1878, 535, s. 7. The test of competency as stated in *Morrill v. Morrill*, 53 Vt. 74, is the ability of the witness, at the time of the attestation, to testify. By the law of Minnesota she was a competent witness and could be examined with the consent of her husband. Gen. Stat. Minn. 1878, 792, ss. 7, and 10, first subdivision. We think when the plaintiff offered the deed in evidence he did consent to her being a witness. The deed was not objected to when offered in evidence for the reason that it was defectively executed. It was pertinent evidence tending to show an assignment of the land to the plaintiff, and not being objected to because not properly witnessed, became legitimate evidence. *Quære*. Whether a deed defectively executed is not good between the parties to it. *Fitch v. Lewiston Steam Mill Co.* (Me.) 5 New Eng. Rep. 862.

VII. The covenant sought to be enforced was contained in a deed executed in Vermont, the grantor domiciled there, the grantees in New Hampshire. The land described in the deed was located in Minnesota. The question arises, by what law is the contract to be governed? The defendant insists (see brief point I.) that the questions "must be decided according to Minnesota law"; and the plaintiff's counsel invoke the aid of that law, upon the questions of the execution of the deed and the transitory character of the action. The contract being one which could only be performed in Minnesota, the parties evidently had in view the law of that state in reference to its execution. We think its construction and force, including the rule as to damages, must be governed by the law of that state. 2 Kent Com. 459. "The law of the place where performance is to occur governs in respect to the validity and performance of contracts made in one state but to be performed in another." Rorer on Int. St. Law, 50. "Matters connected with \* \* \* performance are regulated by the law prevail-

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ing at the place of performance." *Scudder v. Bank*, 1 Otto. 406, 413. The plaintiff claims damages under the rule in this State, viz. : the value of the premises at the time of the eviction. The referee makes no finding of what the law of Minnesota is. It should have been found as a fact. No claim is made that we should presume it to be the same as the law of this State, as we perhaps have the power to do. *Ward v. Morrison*, 25 Vt. 593.

We hold upon the facts reported that the plaintiff is entitled to a judgment ; but instead of rendering one for nominal damages, as is sometimes done in cases where the actual damages are not shown, or presuming that the law of Minnesota is the same as that of Vermont, for the value of the premises at the time of the eviction, which might work great injustice, as the plaintiff is, by right, entitled only to damages accorded him by the law of Minnesota, and the court below having no occasion to examine the subject of damages, the judgment there having been for the defendant, we reverse the judgment and remand the case that the County Court may determine by a recommittal of the report or otherwise, what damages the plaintiff is entitled to by the rule which obtains in Minnesota, and render judgment accordingly.

Judgment reversed and cause remanded.

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Shepard's Heirs v. Shepard's Estate.

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JUSTUS W. SHEPARD'S HEIRS v. JUSTUS W.  
SHEPARD'S ESTATE.*Will, Construction of.*

1. The will contained the following clause: "I give and devise the residue of my estate, both real and personal, in equal shares to my four sisters, Catherine and Callista Shepard and Betsey Martin and Flavilla Batchelder, to them and their children forever, with this condition, that if either of my said sisters should die, leaving no children, then her share as aforesaid to the other sisters living, in equal shares." The will was made in 1850, and the testator died in 1867. One sister died in 1864, leaving a daughter, who has since deceased, leaving three children; another sister died in 1878, leaving no children; another in 1882, leaving children; and the last in 1883, leaving no children; *Held*, that the sisters took only a life estate with remainder to their surviving children; and that the shares of the two sisters, who died without children, should be divided equally, *per stirpes*, between the grandchildren of one sister and the children of the other sister.
2. There is no latent ambiguity in the will, which would permit the admission of testimony to show enmity between the testator and his brother.
3. In construing a will, effect should be given to every clause, and proper force to every word.

APPEAL from the Probate Court. Heard by the court, March Term, 1886, Washington County, POWERS, J., presiding. The contention was as to the construction of a certain clause in the will of Justus W. Shepard, which clause is stated in the opinion of the court. The court decided that the meaning of said will was clear and not ambiguous, and that upon the death of the said J. W. Shepard, the said Betsey Martin, Catherine Shepard and Callista Shepard each were entitled to one-fourth part of said estate in fee, and that Elizabeth Powell, the child of Flavilla Batchelder, deceased, was entitled to the other fourth part of said estate in fee.

Appeal by both parties.

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The testator left no widow, never having been married. On the part of the children of Betsey Martin, evidence was offered to prove, that very great enmity existed, when the will was made and afterwards, between the testator and his brother, Prentiss M. Shepard; that the testator informed his other relatives and friends that none of his property should ever go to his brother; and also to prove that at the time of the making of said will the said Catherine and Calista Shepard had no children, and they each had arrived at such an age that there was then no probability that either of them would ever have any children. The court excluded this evidence.

Evidence was also offered to show that after the decease of J. W. Shepard the will was duly probated and established, and one-fourth of said estate was decreed to Elizabeth Powell, the sole daughter and representative of Flavilla Batchelder, and was paid over to her at that time. That the Probate Court at the same time decreed that the shares of Catherine and Calista Shepard and Betsey Martin were subject to the condition in said will, and that it was necessary to appoint a trustee to hold property under the will and the court then and there appointed Willard S. Martin said trustee, who has ever since managed the fund and paid the interest over to each of the legatees annually, and after the decease of Catherine Shepard the interest on one-half of Catherine's share of the fund was paid over to Betsey Martin and the other half to Calista Shepard annually by the trustee and his account settled in the Probate Court annually; from all which no appeal was ever taken.

That at the time of the settlement of said estate there was placed in the hands of Willard S. Martin, trustee, the sum of \$12,635.58, and that the interest on said fund, or income thereof, has been paid over as aforesaid.

The Probate Court decided that on the decease of Catherine Shepard, that her share descended in fee in equal shares to Betsey Martin and Calista Shepard, and that on the decease of

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Calista Shepard, that portion which she so received from the share of Catherine Shepard descended and became a part of her estate to be distributed according to law.

That the portion or share of Calista Shepard originally under the will, she having deceased leaving no children, be divided equally among the children of Betsey Martin and Flavilla Batchelder, and that the representatives of any deceased child should receive such deceased child's share.

The County Court decided that the evidence offered was immaterial, irrelevant and excluded the same.

*J. A. Wing*, for P. M. Shepard and grandchildren of Mrs. Batchelder.

1. Said Calista, having survived the testator, took an estate in fee. The words, "dying without children," by all rules of law, refer to dying in the life of the testator and cannot have reference to any other time.

That the testator intended his property should be divided between the sisters and their children living at his death, is already shown by the words of the will. He gives the fund to his sisters; makes no provision for a trustee to manage the fund and pay them the interest but gives it directly to them and their children.

It would be absurd to say the testator did not mean by his will, to benefit his sisters while they lived. If he had intended what the other side now claims, he would have had a trustee appointed to manage the fund and pay the interest annually to his sisters.

2. Parol evidence was not admissible. The ruling of the court below was correct. 1 Jar. Wills, p. 409 (top p. 708;) *Wells v. Wells*, 37 Vt. 483; *Button v. Tract Society*, 23 Vt. 337; *Mann v. Mann*, 1 Johns. Ch. 231; *Cheeney's Case*, 5 Co. 68; *Lord Walpole v. Lord Chalmadelly*, 7 Term, 138; *Hawman v. Thomas*, 44 Md. 30; *Brown v. Pembroke*, 6 Cen. Rep. 603; 6 Wait Act. & Def. 386.

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3. The estate of Betsey Martin was different from the estate of Calista Shepard. By the will one-fourth of the testator's estate was given to Betsey Martin and her children forever. This gave Betsey Martin either a life estate with the reversion to her children, or it gave to the mother one-sixth and to each of her five children one-sixth of said one-fourth in fee on the death of the testator, as tenants in common. The children being referred to in said will took some interest under it. *Lord Bindon v. The Earl of Suffolk*, 1 Will. P. 96 (1707); *Bufford v. Bradford*, 2 Atk. 220; *Cannon v. Apperson*, 13 Lea, (Term) 550. The only object in referring to this question was to show that the will was not to the sisters as a class.

4. The law sustains the common sense view of the case. "When the bequest is simply to A, and in case of his death, or if he die, to B, A surviving the testator takes absolutely." 3 Jar. Wills, (ed. 1881); 2 Id. 602, 752; *Lawfield v. Stoneham*, 2 Str. 1261; *Webster v. Hale*, 8 Ves. 410; *Ommaney v. Bevan*, 18 Ves. 292; *Wright v. Stevens*, 4 Barn. Ald. 574; *King v. Taylor*, 5 Ves. 806; *Howard v. Howard*, 21 Beav. 550; *Slade v. Milner*, 4 Mod. 144. In *Hinckley v. Simmons*, 4 Ves. where a bequest of all the testator's fortune was to A, and in case of his death to B, it was held to confer an absolute interest on A surviving the testator. *Clayton v. Low*, 5 Barn. & Ald. is on all fours with the case at bar, substituting grandchildren for children. See to the same point, *Woodburn v. Woodburn*, 23 L. J. Ch. 339; *In re Austin*, 3 Beav. 135; *Fahency v. Holsinger*, 65 Penn. St. 388; *Johnson v. Antrobus*, 21 Beav. 556.

A bequest to A with limitation over in case A should die without leaving issue, vests the sum given absolutely in A if he is alive when the distribution was made and the gift over in such a case will only take effect of A's death before the testator. *Davis v. Davis*, 3 N. J. Eq. 163; see *Burrell v. Burrell*, 38 N. J. Eq. 60; *Jamson v. Cravour*, 4 Del. 311; *Whithead v.*



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*Stoddard*, 58 Vt. 623; *Mitchell v. Morse*, 1 East. Rep. 603; 3 Jar. Wills, p. 2, vol. 770; 2 Meyl & R. 69; 2 R. & M. 197, 210; *Newton v. Reed*, Sim. 141; *Cambridge v. Rouse*, 4 Ves. 12. Courts favor vested estates. 1 Jar. Wills, 351; *Southward v. Convers*, 143 Mass. 189; Cockin's Appeal, 1 Cen. Rep. (Penn.) 890; *Quackenbos v. Kingsland*, 2 Cen. Rep. 918; *Green v. Wilbur*, 1 New Eng. Rep. 815; *Hindman's Appeal*, 21 Reporter, 569; *Richardson's Appeal*, 8 East. Rep. (Penn.) 722; *Shaw v. Ford*, 13 Eng. Rep. Ch. Div. 796; *Merrill v. Emery*, 10 Pick. 507.

“The ordinary presumption is that all devisees and bequests vest upon the death of the testator; and there is nothing in the provision of this will to control that presumption.” Gray, Ch. J., in *Pike v. Stephenson*, 99 Mass. 188. See *Clafflin v. Tilton*, 141 Mass. 243.

5. But if we are wrong in claiming that the words “dying without children,” referred to dying in the life of the testator, it created an estate tail, and the fund being personal property vested absolutely in the first taker and the limitation over was void. 2 Preston Est. 85, 261, 355; *Crocks v. De Vandes*, 9 Ves. 195; PECK, J., in *Brattleboro v. Mead*, 42 Vt. 556; *Attorney-General v. Hird*, 1 Bro. Ch. 171; *Hall v. Priest*, 72 Mass. 18; *Bigge v. Bentley*, 1 Bro. Ch. 187; 3 East 84; 2 R. & M. 55, 378; *Daintry v. Daintry*, 7 Term, 307; *Williamson v. Daniel*, 12 Wheat. 568; 7 Curtis, 392.

6. The property either vested in Calista on the death of the testator, or on the death of Calista it lapsed and became a part of the testator's estate, as there was no sister living to take on the death of Calista.

7. If the fund is to go to the children of the sisters they take *per stirpes*. *Church v. Church*, 1 New Eng. Rep. 485; *Gaines v. Strong*, 40 Vt. 354; *Heath v. Bancroft*, 15 Reporter (Conn.) 461; *Perry v. White*, 2 Conn. 777; *Van Herrick v. Dutch Church*, 20 Wend. 457; *Bove v. Mix*, 17

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Wend. 119; *Putnam v. Gleason*, 99 Mass. 454; *Willis v. Douglas*, 10 Beav. 47; *Arrow v. Mellish*, De G. J. & S. 355; *Stoughtenburgh v. Moore*, 37 N. J. Eq. 63; *Vreeland v. Van Ryper*, 11 N. J. Eq. 133; *Woolson v. Beck*, 34 N. J. Eq. 74; *Patrick v. Royce*, 13 Q. B. 100; 2 Jar. Wills, 19; *Thomas v. Thomas*, 6 Term, 671. The case of *Stowell v. Hastings*, 59 Vt. 494, seems to be nearly like the one at bar. So the case of *Coe v. James*, 4 New Eng. Rep. 591, is a strong case for the plaintiffs. The plaintiffs cited in answer to the defendant's brief, the following: *Hiscock v. Hiscock*, 5 M. & W. 365; *Child v. Gibbert*, 5 M. & R. 71; *Gee v. City of Manchester*, 17 Q. B. 737; 1 Jar. Wills, 437; 2 Ib. 786; *Clayton v. Nora*, 5 Barn. & Ald. 636; *Herring v. Barrows*, 37 Eng. Rep. 26 n.; *Smith v. Bell*, 6 Pet. 68; *Bloomfield v. Eyre*, 54 E. C. L. 556; *Wescott v. Cady*, 5 Johns. Ch. 334; *Hart v. Thompson*, 3 Mon. B. 242; *Moore v. Howe*, Mon. T. B. 199; 3 Gray, 150; *Vedder v. Evertston*, 3 Paige, Ch. 281; *Cross v. Maltby*, 12 Eng. Rep. 20; *Waite v. Littlewood*, 4 Eng. Ch. App. Rep. 70.

*Heath & Fay* and *S. C. Shurtleff*, for the defendant.

The testator first gives his entire property to his four sisters and their children forever, with a condition. It is obvious that the testator intended that if any of his sisters should die childless, in that event her share should be divided among the other sisters and their children, and so on; so that ultimately the children of his sisters as a class should take the property after his sisters should all die. It is a primary rule of construction that a written instrument shall be so construed as to give effect to all its words if possible. In no other way can this will be construed and have the words "as aforesaid" mean anything. These words mean, if any of the sisters die leaving no children that such sister's share, so deceased, shall be divided among the other sisters and their children equally, the same as the original gift was divided; that is,—according to the first division. It is evident, also, that each of the sisters

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would hold any portion received from a deceased sister the same as the portion they received directly and with the same condition attached to it.

The parol evidence was admissible. 1 Jar. Wills, 422.

If the will is construed as the plaintiffs claim, the condition does not take effect, and is void. "The general rule is that when the context is silent, the words referring to the death of the prior legatee, in connection with some collateral event, apply to the contingency happening as well *after* as before the death of the testator." 2 Jar. Wills, 784; *Farthing v. Allen*, 2 Mad. 316; 5 New Eng. Rep. 61. In construing a will, there is no distinction between real estate and personal property. 1 Jar. Wills, 879; *Moffatt v. Strong*, 10 Johns, 12; *Wescot v. Cady*, 5 Johns. Ch. 334; *Greggs v. Dodge*, 2 Day, 28; *McClosky v. Gleason*, 56 Vt. 264.

The sisters took only life estates, with remainder over to their children. *Hart v. Thompson*, 3 Mon. B. 242; *Moore v. Howe*, 4 Mon. T. B. 199; *Attorney-General v. Wallace's Devisees*, 7 Mon. B. 611; *Ex parte, Rogers*, 2 Mad. 449; *Smith v. Bell*, 6 Pet. 68; *Blake v. Hawkins*, 8 Otto, 324; *Roe v. Jeffrey*, 7 Term, 589; 3 Gray, 150; 3 Paige, 381. The court in this State has adopted this doctrine. *McClosky v. Gleason*, 56 Vt. 264. See *Harmon v. Dickinson*, 1 Bro. Ch. 91; *Child v. Gibley*, 2 M. & K. 71; *Cooper v. Cooper*, 1 Kay & Johns. 658.

It might at first view seem inconsistent to hold that the share of Calista Shepard, she having died last without children, should go to her sister's children, when the will says "to the other sisters living;" but it means it to go to the other sisters living, as aforesaid, which is in the same manner as the gift in the first instance, which included the children. *Rowell v. Josselyn*, 59 Vt. 557; 18 Wall, 498; *Cross v. Maltby*, 15 Eng. Rep. 384; *Wait v. Littlewood*, 4 Eng. Rep. 760; S. C. L. R. Ch. 70; *Wake v. Varah*, 16 Eng. Rep. 781; S. C. 2 Ch. Div. 348; 2 Jar. Wills, 727, 751.

The opinion of the court was delivered by

Ross, J. The contentions in this case arise upon the construction of the residuary clause of the will of Justus W. Shepard, which reads: "I give and devise the residue of my estate, both real and personal, in equal shares to my four sisters, Catherine and Calista Shepard and Betsey Martin and Flavilla Batchelder, to them and their children forever, with this condition, that if either of my said sisters should die, leaving no children, then her share as aforesaid to the other sisters living, in equal shares."

The will is dated March 20, 1850. The testator deceased in 1867. In 1864 Flavilla Batchelder died, leaving one daughter, who has since deceased, leaving three children. Catherine Shepard deceased April 11, 1878, leaving no children; Betsey Martin, October 2, 1882, leaving children; and Calista Shepard, October 2, 1883, leaving no children.

The diligence of the counsel of the respective parties has brought to our attention a great number of decisions in which wills have been construed. A careful examination of most of the cases cited, as well as of elementary text books upon the same subject-matter, enforces the truthfulness and justness of the opening statements of Lord SELBORNE, L. C., in his opinion in *Waite v. Littlewood*, 4 Eng. Rep. 760. He says: "There can be nothing more certain than that every will is to be construed by itself, not with reference to other wills; and all the light that can be got from other decisions serves only to show in what manner the principles of reasonable construction have, by judges of high authority, been applied in cases more or less similar." All the principles of construction are only aids in ascertaining, with certainty, the intention of the testator as found in the will itself. When that intention, if lawful, is once ascertained, it is the duty of the court to declare and enforce it. One of the most helpful principles of construction in ascertaining the intention of the testator is, to give force and effect to every clause of the will. It is not to

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be presumed that he used an unnecessary word, or one to which no proper force can be given. It has not been intimated that any other part of the will aids the construction of the residuary clause quoted. The language of the bequest gives the residue to the four sisters and *their children forever*. The children can be legatees only in three ways: They can take *pro rata* with the sisters upon the decease of the testator; or, in substitution of such of the sisters as should decease prior to the testator; or, as reversioners, the sisters taking a life estate in the residue. It is apparent that the testator intended the children to take as certainly and effectually as the sisters; for he provides that the share of any sister who shall die, leaving no children, shall pass to the surviving sisters. This also indicates a primary intention to provide, in the first instance, for the sisters, and subsequently for their children. The County Court evidently held that the children only took as substitutes for such of the sisters as should decease prior to the decease of the testator, and that the estate was to be fully distributed upon the close of the administration.

The counsel for the heirs has cited many cases, and many others may be found in the elementary text books, where the courts have held that an executory devise conditioned that if one of a class die without issue, his or her share shall pass to the survivor or survivors vested upon the decease of the testator, and not after. But in all cases of this kind, so far as observed, the testator had provided that the child, or children, if any there should be, should take in substitution of the deceased parent. Here the testator has made no such provision; but instead has declared, that the residue shall descend to "their children;" that is, all the children of the four sisters. Against the vesting of the shares on the death of the testator is the language of the condition, that the *share* of the sister dying, leaving no children, shall pass to the living sisters. The usual meaning of share is that portion of the estate which has already been set apart to a legatee; and becomes such con-

temporarily or subsequently, to the decease of the testator, but never antedates such decease. This may not be a very potent circumstance; but it is said in Vol. 3, 609 (5th Am. ed.) Jarman on Wills: "But although in the case of an immediate gift, it is generally true that a bequest over, in the event of the death of the preceding legatee, refers to that event occurring in the life-time of the testator, yet this construction is only made *ex necessitate rei* from the absence of any other period to which the words can be referred, as a testator is not supposed to contemplate the event of himself surviving the objects of his bounty; and, consequently, where there is another point of time to which such dying may be referred (as obviously is the case where the bequest is to take effect in possession at a period subsequent to the testator's decease,) the words in question are considered as extending to the event of the legatee dying in the interval between the testator's decease and the period of vesting in possession." Here the language of the bequest naturally refers to the death of any of the sisters, whenever that might occur. It could not be ascertained until that time whether she would die leaving no children; neither could the share of a sister thus dying after the decease of the testator pass to the surviving sisters, as the language of the condition naturally requires, if the share of each sister passed into her possession on the death of the testator. By holding that the death of the testator is the time, when the sisters then living should take in fee, and the children of the deceased sister, or sisters, should take only in substitution of their mothers, only a part of the children would, or might take at all; and such construction does not give full force to the language of the bequest "to them and their children forever." This naturally means, not a part, but all their children. Moreover, if the testator had intended that only the children of such of the sisters, as deceased while he was in life, should take, he would naturally have so expressed himself; or, if he had intended that they should take in substitution of their mothers, he would naturally have said "to them or their

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children forever," instead of "to them *and* their children forever." If this bequest be construed as giving a life estate to the sisters, with remainder to their children surviving, full force is given to every clause, and every word of the bequest. Then the language of the condition is intelligible and easy of application. On the death of any of the sisters leaving no children—whenever that may occur—"then her share as aforesaid," that is, the share in which she took a life estate, and the children, the reversion, passes to the living sisters in equal shares; but only as life tenants. The language of the bequest is not that of an unqualified gift to the four sisters. First, their children are to take in same manner with them. Then the condition shows, whatever estate they severally take, is liable to be defeated on the contingency, if any of them die, leaving no children. The language of the entire bequest impresses us that it was the testator's intention, as natural affection would prompt, to provide primarily for his sisters. When we look at the condition, we find they were not to take in fee, for the share thus taken was to be kept intact so it could, on the contingency there named, pass to the surviving sisters. Then their children were to take forever, or absolutely. Such being the construction, we place upon the language of the bequest, there is no latent ambiguity in the bequest which would permit the admission of the offered testimony, and there is no occasion to discuss the question when such testimony is admissible. On this construction, the shares of Catherine Shepard and Calista Shepard, who died leaving no children, pass equally to the grandchildren of Flavilla Batchelder and to the children of Betsey Martin. The question has not been discussed whether by "their children" the testator intended they should take *per capita* or *per stirpes*. But the usual rule, in such cases, is they take *per stirpes*; that is, the children take only that of which their mothers would be life tenants, if they had survived the sisters who died leaving no children. It is apparent if all the sisters had died leaving children, the children of each would take only the share of

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their mother. But it is contended that the share of Calista Shepard, inasmuch as when she deceased, there was no surviving sister to take under the conditional clause, descended to her heirs. But if we have correctly construed the will, the whole residue was only given to the sisters for life, and then was to pass to their children. Hence the fee of the residue vested at once in the children, the share of each child subject to be increased by the death of any of the life tenants, leaving no children. The authorities are to the same effect. A bequest to two daughters, and if one should die without issue, then to the surviving daughter and her issue. One of the daughters married and died leaving issue. Then the unmarried daughter died; and it was held that the money went to the issue of the married daughter although she did not survive her sister. *Harman v. Dickenson*, 1 Bro. Ch. 91. To the same effect in principle is *Cross v. Maltby*, 15 Eng. Rep. 384, and *Wake v. Varah*, 16 Eng. Rep. 781.

Judgment of the County Court reversed and judgment that the original share of which Flavilla Batchelder would have been life tenant if alive at the death of the testator was properly decreed to her daughter; that the original share of which Betsey Martin was life tenant be distributed to her children; and that the accruing shares of which Catherine Shepard and Calista Shepard were life tenants, be distributed, one half to the children or representatives of the children of Betsey Martin, if any have deceased since the decease of the testator, and the other half to the grandchildren of Flavilla Batchelder.



TOWN OF ROXBURY v. THE CENTRAL VERMONT  
R. R. Co.

*Railroad. Highway Crossing. R. L. s. 3383.*

1. JURISDICTION. An action at law based upon section 3383, R. L., can be maintained against the receiver of a railroad company for negligence in constructing a crossing, although leave was not obtained of the Court of Chancery to bring it.
2. CROSSING, LIABILITY OF RAILROAD TO TOWN. The railroad company of which the defendant was receiver being empowered under its charter to build its railroad across highways, provided it restored them as near as practicable to their former state and usefulness, to the acceptance of the selectmen, or in case of their refusal, to the acceptance of the commissioners, constructed its railroad across a highway in the plaintiff town, but neglected to restore it to its former usefulness, and left it defective through failure to put railings along the approaches constituting a part of the crossing. After the charter had been granted and the railroad built, a statute was passed, making railroad companies liable to towns for damages resulting from insufficient crossings. In an action to recover the amount of a judgment and the expenses attending it, which had been rendered against the plaintiff in favor of a traveller for injuries occasioned through want of said railings; *Held*, that the company failed in its primary duty; that its liability became established by the facts that it failed to restore the highway as the charter provided, and that the crossing had never been accepted; and if the approaches extended beyond the surveyed limits of the railroad and railings were required, it was the duty of the company to build them.
3. CHARTER. STATUTE. Although the charter was exempt from amendment and repeal, it was unnecessary to decide whether there was error in the charge to the jury, that the statute on which the action was based, was controlling; for the right of action upon the facts existed in any event; and a wrong reason for a correct decision is not reversible error.
4. DUTY OF RAILROAD IN BUILDING A CROSSING. The general rule is that where a railroad company is authorized to cross highways, it is under a duty to construct its road across them in a reasonable manner with reference to the double use of crossing for its own purpose, and for travellers, and that the right is subject to the maxim, *Sic utere tuo ut alienum non lædas*.

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5. **STATUTE OF LIMITATIONS.** The defendant cannot protect itself, against the liability on the ground that the Statute of Limitations would bar an action for the original obstruction; for the obligation and the negligence were continuing.
6. **CROSSING.** The word "crossing," as used in the statute and applied to the intersection of a highway and a railroad, means the entire structure, including the approaches, although a part may be outside the limits of the railroad lands.
7. **ESTOPPEL.** The doctrine of estoppel does not apply; as it does not appear that the railroad company was misled in reliance upon the action of the town, or knew what the town did in making repairs on the approaches.
8. **PRACTICE.** The Supreme Court cannot find or infer a waiver of acceptance of the crossing, from the slight repairs made by the town on the travelled track of the fill, when the jury found that neither the selectmen nor commissioners accepted it.

**ACTION** based upon section 3383 of the Revised Laws. Heard on demurrer to the writ and declaration, March Term, 1885, Washington County, REDFIELD, J., presiding. Demurrer overruled. Exceptions allowed and ordered to be certified into the Supreme Court. The County Court having adjudged the writ and declaration sufficient, the defendant pleaded the general issue with notice of a special matter to give in evidence; and there was a trial by Jury, March Term, 1885, POWERS, J., presiding. Special and general verdict for the plaintiff.

The writ was directed against "The Central Vermont Railroad Company, a corporation organized and doing business under the laws of the State of Vermont." The declaration commenced as follows: "In a plea of the case founded on section 3383 of the Revised Laws of the State of Vermont, whereupon the plaintiff declares," etc.; and among other things, it was alleged, that the Central Vermont R. R. Co. was incorporated in 1872, and after its organization "it was appointed receiver, or receiver and manager of the Vermont Central Railroad Company and as such took possession of said road-bed and track and other property of the Vermont Central Railroad Company, and has used, operated and had the exclusive control and management of the same for: to wit, seven years last past."

The following statement was agreed on:

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“That the Vermont Central railroad company prior to the year 1850 built its road-bed through the town of Roxbury, and commenced running regular trains upon and over it, and the same has been in constant use for a railroad from that time up to the present time. That in the construction of said road-bed, it crosses a public highway in the town of Roxbury, between the dwelling-house of Azro Simons and the dwelling-house of Marshall Latham, which highway was laid out, established and used for a highway long before said railroad was built and ever since has been used for a highway, and that during all this time, the town of Roxbury, by law, has been bound to keep said highway in good and sufficient repair. That the railroad track and the highway both run in a northerly and southerly direction, but near the point of crossing, going in a northerly direction from Roxbury village, towards Northfield, the highway is on the westerly side, and the highway turns easterly and crosses the track at nearly right angles, and there makes a curve northerly on the easterly side of the track, then on northerly, not parallel with the railroad track, but gradually diverging easterly from the railroad track, but in plain sight; and the travelled highway at the point one hundred and fifty feet northerly of said crossing is not more than one hundred feet from the railroad track.

“In the construction of the road-bed, upon which the rails are laid, the grade at this crossing is six feet higher than the road-bed of the highway was before the railroad was built, and when the railroad was built this fill of about six feet was made.

“From said crossing upon said highway, some rods each way, the road has been filled so as to make the slope of the road-bed of the said highway gradual from the point where it crosses said track down as far as the fill extends; that the embankment upon said highway each side of said crossing, is about six feet high at the crossing and gradually grows less each way, as the road is more distant from the crossing, and reaches the road-bed, as it was before said railroad was built, in about ten rods from said crossing.

“That said highway, as it was before said railroad was built, was nearly on a level with the lane on the easterly side of said highway for ten rods each side of said crossing; that no railing or other muniment was ever built or maintained by any one on the easterly side of said highway for the protection of travellers, for ten rods each side of said crossing.

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"That on the 29th day of September, 1880, one Orlando G. Fassett, of Warren, Vt., was passing over the highway aforesaid, with his horse and wagon, and as he claimed, as he approached said crossing did not hear or see an approaching train upon said railroad, coming from the north, until he was within about twelve feet of said crossing, and said train was near said crossing.

"He could not turn around with his team without running off the embankment to the east of said highway, but on the west side of the railroad track; that he concluded it was the safest course to attempt to drive across the track ahead of the train, which he did; that his horse was much frightened by the train so that he did not obey the rein, and after crossing the track kept on in a course to the northeast, which course brought his horse and wagon in which he was riding, nearer the edge of the embankment on the east side of the crossing on the east side of the highway; that his horse was running and he could not control him, and his wagon began to tip over said embankment at a point about ninety feet from the railroad track and he was thrown out, and his wagon fell upon him on the level land on the east side of the highway at a point one hundred and twenty feet from the railroad track. At the point where said Fassett's horse and wagon went off the embankment, the embankment was three feet high.

"The only particular in which the said Fassett claimed the highway was insufficient was the want of a railing on the east side of the highway along the embankment made in constructing said crossing.

"Said Fassett duly notified the town of Roxbury thereof, on the 14th day of November, 1880, and that he claimed damages for his injuries, of Roxbury, and brought his suit against said town to recover for said injuries, returnable at the March Term of Washington County court, 1881. After said suit was brought and before the close of the term of court to which it was returnable, the town of Roxbury duly notified the Central Vermont railroad company to appear and defend said suit, but said corporation did not appear or defend said suit, but said town of Roxbury did appear and defend said suit, and such proceedings were had in said cause that said Fassett recovered judgment against the town of Roxbury for his injuries, which said town paid before the bringing of this suit.

"That at the point of this crossing the width of the railroad

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survey, as recorded in the town clerk's office in the town of Roxbury, is forty-four and one-half feet on the westerly side and fifty-four and one-half feet on the easterly side of the center of said track.

"That at the time of the injury to said Fassett, the Central Vermont railroad company as receivers and managers were in the management of the Vermont Central railroad, and had the exclusive management and control of the same, and had had such exclusive management and control of the same five years prior to said injury; that the statute upon which this action was founded was passed since the railroad aforesaid was constructed; that the injury to said Fassett actually occurred outside of the surveyed limits of the railroad.

"It is conceded, the statute on which this suit was brought, was passed subsequently to the organization of the Vermont Central railroad company and the construction of said railroad, and that the place where said Fassett actually was injured, was outside of the surveyed limits of the railroad.

"It is mutually agreed by the plaintiff and defendant that the foregoing facts will be conceded on trial.

"It is hereby stipulated that on the trial before the jury, the following facts will be conceded:

1. That the Vermont Central railroad company organized under its charter, passed by the legislature of the State of Vermont in 1843, and built that portion of its road which runs through the town of Roxbury, as early as 1849, so that the regular trains run over its road. The charter of said company as published in the session laws of 1843, may be used in evidence.

2. That the legislature of the State of Vermont at its session in 1872, chartered the Central Vermont railroad company, which company organized under its charter, and as early as 1875, said corporation was appointed receiver and manager of the Vermont Central railroad company, and as such took possession of the road-bed and all other property of the Vermont Central railroad company, and commenced running trains upon said railroad, and from that time until after the accident in question, had the exclusive management, possession and control of said railroad, and were running the trains upon said railroad at the time of the accident in question. The charter of the Central Vermont railroad company, as published in the session laws of 1872, may be admitted in evidence."

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It appeared that the defendant company was organized under its charter in 1843 and built that portion of its railroad through the town of Roxbury, so the cars ran through from White River Junction to Roxbury in 1848 and thence to Northfield in the same year; that said railroad was built through the valley between Roxbury village and Northfield village, and at a point about one and one-half miles north of Roxbury village, it intersected a highway between said villages. Said highway was then the county road so called, and was at the time said railroad was built and ever since has been an open public highway and the principal thoroughfare for teams between said villages, and was laid out by a court's committee in 1831; that said highway from Roxbury village to said place of intersection, and thence north to Northfield line, one and one-half miles, was in the town of Roxbury and after said highway was built, and ever since, it has been used as a public highway and during all this time, the town of Roxbury has been bound to keep it in good and sufficient repair.

That in the construction of the road-bed of said railroad, the railroad company made a fill upon which the rails were laid, at said place of intersection, so that the grade was about six feet higher than the road-bed of the highway.

The plaintiff's evidence, which was not contradicted by the defendant, tended to show that from said point of intersection easterly for about twenty-five rods, said county road, prior to the building of said railroad, passed upon swampy land through a meadow, and that the highway at this place had been built by placing bushes upon the ground and putting earth upon them, and that in the springtime it was very muddy, and frequently inundated; and that after the road-bed of said railroad was built, the railroad company made a fill on each side of its road over the old highway, so that the slope from the railroad on each side was gradual, and that said fill on the easterly side of said railroad was about six feet high at said crossing and extended back about ten rods, and that said high-

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way and the approaches to the crossing on both sides were built by said railroad company in 1849.

The defendant's evidence tended to show that the crossing and the approaches to it on said easterly side were well made and in such a manner as to restore the highway to its former state and usefulness, as near as practicable; that after said highway was completed on each side of said crossing by said railroad company, the town assumed the care and control of said crossing and the approaches to it, outside the limits of said railroad and thereafter always took care of the same.

The counsel for the defendant requested the court to charge the jury as follows :

1. That the statute of 1855 did not attempt to impose any duty upon the railroad company, nor do the Revised Statutes, except to take care of this crossing upon the railroad, or under, or over it. That in this particular case it did not attempt to create any duty upon the railroad company, beyond its surveyed limits.

2. That the legislature could not impose the duty on this railroad company, whose charter was exempt from amendment and repeal, to repair or maintain the crossing beyond its surveyed limits.

3. That the injury to the plaintiff (Fassett) occurred about ninety feet easterly and southerly of the track, where his wagon went off the highway, under the agreed statement of facts, and the distance from the track to the surveyed limits of the railroad on the east side was fifty-four and one-half feet, so that, therefore, the injury to Fassett occurred about thirty-five and one-half feet easterly from, and outside the surveyed limits of the railroad. That, therefore, the plaintiff cannot recover, because the injury happened at a point on the highway outside of the crossing, and at a point where the road was restored to its former state and usefulness in 1849, by the Vermont Central company.

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The court refused to charge as requested, and to such refusals to charge the defendant excepted.

The court charged the jury that the statute upon which the action in this suit was founded, was applicable to this suit, and that it was competent for the legislature, notwithstanding the defendant's charter, to pass such a statute, and thus impose upon this railroad company the additional duty of keeping crossings in repair and rebuilding them when necessary, and that said statute was valid and obligatory on the defendant, and that the duty is cast upon the defendant by virtue of this statute, to take the care and control of said crossing; that said statute was not designed to invade any of the chartered rights of the defendant, but that it was in the nature of a police regulation and designed to protect the travelling public; that the burden of proof was cast upon the plaintiff to satisfy the jury, by a fair balance of evidence, that the place where Fassett received his injury was a part of the railroad crossing; that the claim of the defendant, that the statute is limited to such part of the highway as is within the limits of the railroad company, *viz.*: six rods, is too narrow a view of the statute; that a crossing over a railroad track may include so much of the railroad as is within such limits, or it may extend a considerable distance beyond those limits; that if the structure that is made for the purpose of enabling the travelling public to get over the railroad, requires approaches each way, longer or shorter, those approaches are, properly speaking, a part of the crossing itself, just as much as the part that is between the rails; that the words of the statute would convey the idea that the crossing is to embrace everything that is required to enable the travelling public, safely and conveniently to get over the railroad; that in determining what the crossing is, properly speaking, the jury were to have in view the use by the railroad and the threatened danger to the public travel; that the state of repair was to be measured to a certain extent, by the threatened danger; that if the threatened danger required a



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wider track and a smoother approach, it is expected of the railroad company; that everything that is built for the accommodation, safety and convenience of the travelling public, where a railroad crosses a highway in obedience to this statute, whether it be an embankment or an approach, is, properly speaking, a part of the crossing; that in this case, if the fill or embankment extended out as far as the place where Fassett received his injury, and it was properly required to meet the safety, convenience and accommodation of the travelling public, the fill or embankment was a part of the crossing, notwithstanding, it was a considerable distance from the surveyed limits of the railroad, itself.

To the charge of the court as above stated, the defendant excepted.

The court submitted to the jury the following special verdict which was answered as follows:

1. Did the Vermont Central Railroad employees make any repairs upon the approaches to the crossing in question, outside the surveyed limits of the railroad, and near the place of Fassett's accident, after 1849? No.

2. Did the town of Roxbury make all the repairs that were made upon such approaches, after 1849? Yes.

3. Did the commissioners accept the crossing in question? No.

If question No. 3 is answered in the negative, then answer the following, No. 4.

4. Did the selectmen accept the crossing in question? No.

The jury also returned a general verdict for the plaintiff.

After verdict, the defendant moved that judgment be rendered for the defendant by reason of the special verdict found by the jury that the plaintiff made all the repairs that were made upon the approaches to the crossing in question, outside the surveyed limits of the railroad, and near the place of Fassett's accident, after 1849.

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The court overruled the motion, to which the defendant excepted.

The exceptions were allowed, execution stayed, and the cause passed to the Supreme Court.

*Noble & Smith* and *B. F. Fifield*, for the defendant.

The case shows an attempt by the town to hold the defendant liable as a *corporation* in its *personal* capacity for damages that occurred on a highway on the line of a railroad which it was operating exclusively as *receiver*.

When the affairs of a railroad are such as to require a receivership, the property goes into the hands of the court in the first instance, the court then delegates an officer to be a receiver to operate the property in its stead. The officer, as an individual, has no *ownership* in the property, and hence, as an individual, occupies a very different position from the corporation which owned and possessed the property *before* the receivership existed.

The execution will run against the private property of the defendant. It cannot run against the receivership property, for the judgment record would show the corporation alone liable for the demand. To hold this would be against all general principles, and in conflict with the law applicable to receivers. *Pierce on R. R.* 285, and authorities cited.

It is a general rule that before suit is brought against a receiver leave of the court by which he was appointed must be obtained. *Davis v. Gray*, 16 Wall. 203, and cases there cited; *Hall v. Smith* 2 Bing. 156; *Camp v. Barney*, 4 Hun (N. Y.), 373; *Commonwealth v. Runk*, 26 Pa. St. 235; *Thompson v. Scott*, 4 Dill. 508.

Nor does the case at bar come within the rule laid down in *Blumenthal v. Brainerd*, 38 Vt. 402, and other similar cases in this State. These were all actions *ex-contractu*, and are different from the case at bar, and are governed by a different principle. Nor can it be said that section 3300 imposes any personal liability on a receiver. The declaration shows the

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property was in the exclusive possession of a receiver; and it is not pretended that leave to bring the suit was obtained or even sought. The doctrine on this point is clearly and fully stated in *Barton v. Barbour*, 104 U. S. 126-128, by Mr. Justice WOODS.

The court below charged that section 3383 R. L., was a police regulation. This was error. Ch. J. REDFIELD in *Nelson v. Vt. & Can. R. R.* 26 Vt. 718-721, says: "It is certain, we think, that the legislature cannot impose new burdens upon corporations under such circumstances, which are merely and exclusively of private interest and concern, and which have nothing to do with the general security, quiet and good order."

The duty of the towns to take care of their highways is not lessened by section 3383; nor their liability to answer damages for accidents happening thereon. It matters not to the public travelling over the highway by whom the highway is repaired. This section of the statute is, therefore, a matter of private concern only, between the towns and the railroad, and in this view loses entirely the vital characteristic of a police regulation, which is required, in order to be valid, to concern "the general security, quiet and good order." See *Thorpe v. R. R.* 27 Vt. 140.

The section therefore is void as to the Vermont Central railroad, since it materially interferes with its vested rights—its charter being granted without reserving the right to annul, alter or repeal the same.

The verdict shows that the railroad company never made any repairs on the crossing in question, and that the plaintiff town made all of them; and the exceptions show that the defendant's evidence tended to prove that the town assumed the care and control of the crossing and its approaches, after it was restored by the railroad.

It was error to overrule the defendant's motion for judgment, by reason of the special verdict.

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There is a provision in the charter that the railroad shall restore the highway to its former state and usefulness, as near as practicable, but none that the company should take care of it, when restored. Hence, it was the duty of the town to take care of the highway, the same as before the crossing was made.

No question can be made but that the crossing was restored to its former state and usefulness as near as practicable. The defendant's testimony, which was uncontradicted, showed this. It could be accepted in one of three ways: By agreement with the selectmen; by acceptance of the commissioners; and by user and adoption by the town. The road was laid out in 1831, and had always been used since that time.

This then was clearly an acceptance of the crossing, and adoption of it as a part of the town's highway.

The statute is not a police regulation, and if it was, the place where the injury happened was outside the surveyed limits of the railroad; and if the legislature could impose the duty on the railroad company to take care of the highway for three rods outside of the surveyed limits of the railroad, then they could for half a mile.

The statute of 1855 at all events does not attempt to create the duty upon the railroad company to take care of anything but the crossing. What is a crossing? It does not embrace anything outside the surveyed limits of the railroad.

The place where the accident happened, therefore, was no part of the crossing.

The town assumed to take care of this crossing from 1848 down to 1855, when the statute was passed, as it was clearly its duty to do. After 1855 it did precisely the same thing. The railroad company repudiated the statute as being an infringement of its charter rights, and never made any repairs upon it (the crossing and approaches,) and the town assenting to it proceeded to take care of the crossing, and made all the repairs upon it down to the present time.

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Whether, therefore, the statute of 1855 was constitutional or not, as imposing a new duty upon the company, or whether the word "crossing" in the statute of 1855 will embrace any part of the highway outside of the surveyed limits of the railroad, is immaterial. They assented to the claim of the railroad that it did not belong to the railroad to repair, and the town having kept it in repair themselves for more than thirty years, are estopped from saying that it belonged to the railroad to keep in repair.

Where the facts are "undisputed, their sufficiency to warrant the conclusion that the road was adopted as a public highway would be a question of law." *Folsom v. Underhill*, 36 Vt. 587; *Pratt v. Swanton*, 15 Vt. 147.

"Acts of the selectmen appropriating money or labor to the repair of an existing road within their town, manifest an intention to adopt and treat the road as an existing public highway." *Folsom v. Underhill*, *supra*; Rob. Dig. 358.

*Z. S. Stanton, S. C. Shurtleff, and Senter & Kemp*, for the plaintiff.

Consent cannot confer jurisdiction when it is not given by law. *Gliden v. Elkins*, 2 Tyler, 218; *Thayer v. Montgomery*, 26 Vt. 491.

Courts of Chancery will protect its officers by an injunction from suits at law in all proper cases; but the fact that the defendant is such an officer or agent, is no defence at law. *Sprague v. Smith*, 29 Vt. 421; *Blumenthal v. Brainerd*, 38 Vt. 402; *Morse v. Brainerd*, 41 Vt. 550; *Cutts v. Brainerd*, 42 Vt. 566; *Newell et al. v. Smith et al.* 49 Vt. 255.

The first statute on this subject was passed in 1855 and was as follows: "Section 2. Any person or persons, having the possession of, control or management of any such railroad, or of the engines and cars running thereon, either as lessees, assignees or trustees, or in any other capacity shall perform

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the same duties and be subject to the same liabilities, to be enforced in the same manner as is provided in the first section of this act in the case of a railroad corporation."

This section, only changed to adapt it to all cases, went into the General Statutes (Chap. 28, Sec. 41), and is now embraced in section 3300 of the Revised Laws. Both of these sections were in force at the time the cause of action accrued.

Sections 40 and 41, chap. 28 of the Gen. Sts., whereby railroads were made liable to towns for injuries resulting from defective crossings were consolidated into section 3383, R. L. They were not new statutes. R. L. s. 4590. The approaches to the crossing were to be kept in repair by the railroad. R. L. s. 3383; Gen. Sts. chap. 28, ss. 38, 40; Laws of 1855, No. 28, s. 1; Laws of 1852, No. 26, s. 1; defendant's charter, s. 10. The word "crossing" is not limited to what is included between the rails, but includes the entire embankments, whether within or without the surveyed limits of the railroad. *North Staffordshire Railroad Co. v. Dale*, 8 Ell. & Bl. (92 E. C. L.), 835; *Freeholders of Sussex Co. v. Strader*, 18 N. J. L. 108; *Penn Township v. Perry Co.* 78 Pa. St. 457; *Daniels v. Intendant and Wardens of Athens*, 55 Ga. 609; *People v. N. Y. Central & Hudson R. R. Co.* 74 N. Y. 302; *Hayes v. N. Y. Central & Hudson R. R. Co.* 9 Hun, 63; *Parker v. Boston & Maine Railroad*, 3 Cush. 107; *Commonwealth v. Inhabitants of Deerfield*, 6 Allen, 449; *Titcomb v. Fitchburg Railroad Co.* 12 Allen, 254; *White et al. v. the Inhabitants of Quincy*, 97 Mass. 430.

The legislature imposed no new liability by these statutes; for whatever the defendant was bound to build, it was bound to repair. The statutes merely gave a remedy to enforce the rights of the town, that by the terms of the charter already existed, under the act of incorporation the Vt. Cen. R. R. Co. had a right to cross highways on condition that it restored them, so near as practicable, to their former state and useful-

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ness. When in crossing a highway, it becomes necessary to build a bridge over the railroad, the company is under obligation to keep it in repair. *People v. Troy & Boston R. R. Co.* 37 How. Pr. 427; *Rowe v. Elmendorf*, 52 How. Pr. 232; *Cott v. Lewiston R. R. Co.* 36 N. Y. 214; *People v. N. Y. Central and Hudson R. R. R.* 74 N. Y. 302; *Penn. R. R. Co. v. Borough of Irwin*, 85 Pa. St. 336; *Burritt v. New Haven*, 42 Conn. 174.

Charters like this one are construed liberally for the benefit of the public, and strictly as against the corporation. *Burritt v. New Haven*, 42 Conn. 174. See *Hamden v. New Haven Co. et al.* 27 Conn. 158.

The right to regulate railroad crossings flows from the police power, which the legislature does not and cannot divest itself of by granting a charter. *Pittsburg & Connellsville R. R. Co. v. the Southwest Penn. Railroad Co.* 77 Penn. St. 173. The general rights and powers of a corporation are subject to the same legislative control. *Bank v. County of Hamilton*, 21 Ill. 53; *Chicago Life Ins. Co. v. Needles*, 20 Rep. 129.

Such legislation violates no contract, and interferes with no vested rights. *People v. Boston & Albany R. R. Co.* 70 N. Y. 569; *Galena & Chicago Union R. R. Co. v. Appleby*, 28 Ill. 283; *Branch v. Wilmington & Weldon R. R. Co.* 77 N. C. 347; *Ruggles v. Illinois*, 108 U. S. 526; *Kansas Pacific Railway Co. v. Mower*, 16 Kan. 573; *Blair v. Ill. & Prairie Du Chien R. R. Co.* 20 Wis. 254; *Ind. Pittsburg & Cleveland R. R. Co. v. Marshall*, 27 Ind. 300; *Ind. & Cin. R. R. Co. v. Kercheval*, 16 Ind. 84; *Ohio & Miss. R. R. Co. v. McClelland*, 25 Ill. 140; *New Albany & Sulem R. R. Co. v. Tilton*, 12 Ind. 3; *Galena & Chicago Union Railway Co. v. Loomis*, 13 Ill. 548; *Gorman et al. v. Pacific R. R.*, 26 Mo. 441; *Nelson v. Vermont & Canada R. R. Co.* 26 Vt. 717; *Thorpe v. Rutland & Burlington R. R. Co.* 27 Vt. 140.

The opinion of the court was delivered by

VEAZEY, J. This suit was brought to recover of the defendant railroad company the amount of a judgment which had been rendered against the plaintiff town for injury to a traveller upon a highway by reason of its insufficiency which consisted of an embankment or fill constituting an approach in the highway to a railroad crossing, and having no railing at the sides of the fill to protect the traveller from going off.

The defendant company was cited in to defend the former suit but did not appear. The defendant filed a general demurrer to the writ and declaration which was overruled and the declaration adjudged sufficient, to which the defendant excepted.

The only objection urged under the demurrer is that the defendant company was in possession of this railroad and operating the same as receiver and manager under the order and appointment of the Court of Chancery, and the declaration does not allege that leave was obtained of that court to bring this suit, therefore the County Court had no jurisdiction. The case of *Lyman* against this same defendant lately decided, 59 Vt. 167, is full authority and controlling against the defendant on this point.

The County Court having adjudged the declaration sufficient, the cause went to trial by jury and further exceptions were taken.

This suit was based upon section 3383 of the Revised Laws, which was first enacted in 1852 and 1855, and after the act of incorporation of the Vermont Central railroad company and after its railroad was built across the highway in question. Contrary to the defendant's requests the court charged the jury that notwithstanding the charter of the railroad company was prior and was exempt from amendment and repeal the enactment now incorporated in section 3383 R. L. was competent, applicable, and controlling upon the railroad company and did



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not infringe any of the chartered rights of the company, and that it applied to what constituted the railroad crossing as a whole although not wholly within the limits of the railroad land. To this ruling the defendant excepted.

The railroad land at this point was six rods wide. The track was six feet above the grade of the highway before the railroad was built, and in constructing the approaches on the highway to the crossing the embankment or fill extended beyond the limit of the railroad land and the injury to the traveller occurred on this fill about thirty-five feet outside the surveyed limits.

The charter of this railroad company was granted in 1843, before any railroads had been built in the State; but highways existed everywhere, and the statutes of the State then and ever since required them to be good and sufficient, and until recently made the towns respectively liable for special damages occurring to travellers by reason of their insufficiency.

The general rule is, that where a railroad company is authorized to cross highways, it is under a legal duty to construct its road across them in a reasonable manner, with reference to the double use of the crossing for its own purposes, and for travellers upon the highways; that is, the right is subject to the principle of law which is so universal as to have become a maxim, *Sic utere tuo ut alienum non lœdas*. Pierce on Railroads, p. 243, and cases there cited.

Section 10 of this charter conferred the right upon the company to build the railroad across highways provided it *restored* the highway thus intersected as near as practicable to its former state and usefulness, to the acceptance of the selectmen of the town, or, in case of their refusal, to the acceptance of the commissioners provided in the charter. Presumably this highway, before it was interfered with by the building of the crossing, was such as the statute required, *viz.* : good and sufficient.

Therefore in order to restore the highway at this crossing to its former state and usefulness as near as practicable, it was necessary to make it good and sufficient. Prior to the crossing

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the land was level; hence no railings were required. The highway was left by the company defective, not "good and sufficient," not in its former state and usefulness as near as practicable, by not putting railings along the sides of the embankment. Therefore, the company failed in its primary duty under the charter.

Neither the selectmen nor the commissioners ever accepted the crossing.

It is plain that the company's duty did not end at the line of its land, if the highway could not be made good and sufficient without extending the fill of the crossing further. A crossing that could not be used in ordinary travel on the highway without the embankment or fill constituting the approaches being extended beyond the railroad land, would not be, without such extension, such a crossing as the law required. With such a defective crossing the highway would not be *restored* to its former state and usefulness. It would not be good and sufficient.

There is no reason why a town should be put to expense to build the approaches to a crossing. It receives no compensation for the right to cross.

We further think that the word *crossing*, as applied to the intersection of a common highway and a railroad and as used in the statutes, means the entire structure, including the approaches, although a part of the structure may be outside the lines of the railroads lands or the place where the roads actually cross each other. Such is the holding as to bridges whether over streams or roads. *White v. Quincy*, 97 Mass. 430; *Pierce on Railroads*, 250, and cases there cited; and see cases cited in plaintiff's brief. Such was also the ruling as to a crossing like this in *Farley v. C. R. I. & P. R. Co.* 42 Iowa, 234.

We therefore hold that it was the company's duty under the charter to so construct the highway at the crossing that the same should be, as nearly as practicable, as available for the safe use

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of the travelling public, as the highway was before, and if the elevation was such that the approaches on the highway must extend beyond the surveyed limits of the railroad in order that the crossing might be thus available, then the charter contemplated the building of the approaches to meet the necessity; and if a railing along the sides of the embankment constituting the approaches was required to thus *restore* said highway, the building of such railing was the duty of the company.

The company not having performed the condition of the charter in respect to restoring this highway to its former state and usefulness cannot claim immunity under it.

The obligation to restore was constant until performed. The negligence in the primary duty was continuing. The liability is like that in the ordinary case where a person puts an obstruction in the highway creating a defect and causing special damage to a traveller. Such person must reimburse the town for a judgment recovered against it for injury resulting from such defect.

The railroad company cannot protect itself against such liability on the ground that the Statute of Limitations would bar an action for the original obstruction. *Hamden v. New Haven N. Co.* 27 Conn. 158; *Burritt v. New Haven*, 42 Conn. 174.

These views render it unnecessary to pass on the construction of the statutes of 1852 and 1855, as embodied in section 3383 R. L.

The liability of the railroad company became established by the facts that the company failed to restore the highway as the charter provided, and that the crossing was never accepted by the selectmen or commissioners, if nothing else appeared to meet this condition.

Therefore, the provision of section 3383 that "the corporation shall keep in good and sufficient repair," etc., imposed no additional burden on the defendant, as to this crossing, to that

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which existed under the charter. So that it is immaterial whether this section will bear the construction which the County Court gave it or not. The right of action existed under it upon the facts in this case in any event. That being so an unsound reason for so holding did not constitute reversible error. We do not decide whether or not the County Court correctly construed the statute.

The jury returned a general verdict for the plaintiff, but found specially that the plaintiff made all the repairs that were made upon the approaches to the crossing, after 1849, when the railroad was built, but found that neither the railroad commissioners nor the selectmen accepted the crossing. After verdict the defendant moved that judgment be rendered for the defendant by reason of said first finding in the special verdict.

This motion was based upon the proposition that there was an acceptance by the town by use and adoption. The doctrine of estoppel does not apply, as it does not appear that the railroad company was misled in reliance upon the action of the town. It does not even appear that the company knew what the town did or that it did anything on that embankment.

The acts of a party cannot operate as an estoppel in favor of a person having no knowledge of them, and consequently in no way misled by them. *Bucklin v. Beals*, 38 Vt. 653. Estoppel *in pais* cannot be set up, unless it appears that the action of the party setting it up was influenced by the act, declaration or omission claimed to constitute the estoppel. *Warley v. Edson*, 35 Vt. 214.

The question is not as argued whether this was a highway by adoption. It was a regularly laid out highway long before the railroad crossed it. The question is whether the town was affected by its action in keeping the approaches in repair the same as it would have been by an acceptance by the selectmen or railroad commissioners as the charter provided.

If there had been no finding of non-acceptance by either board, then there would be room for presumption of accept-

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ance, and after such lapse of time, perhaps the presumption ought to be conclusive. But there can be no presumption of a fact one way when the fact is established the other way.

Possibly the town might have waived acceptance by the selectmen and accepted the crossing in some other way, but there is no such finding. All that can be claimed on this point from the special verdict is that it tends to show a waiver; but this court cannot make that inference, or find any fact.

The slight repairing of the travelled track of the fill, shown by the exceptions, certainly does not necessarily imply a waiver of the duty to put up a railing such as was needed in order to restore the road to its former state and *usefulness*, or an acceptance of the crossing as a whole without a railing, especially when it appears that neither tribunal designated in the charter ever did accept it.

If the jury had found specially that the railroad company relied upon the action of the town as an acceptance; or had omitted to find that the selectmen and commissioners did not accept; or had found that the town waived acceptance by the selectmen, the defendant's motion would have stood on stronger footing.

Upon the verdict as it was, both general and special, we think there was no error in overruling the motion for judgment for the defendant.

Judgment affirmed.

## STATE v. THOMAS WARD.

*Criminal Law. Pleading. Grand Jury.*

1. **MOTION TO QUASH.** A motion to quash must be founded upon facts appearing of record, or admitted or shown by the plaintiff's proof. And such motion, supported by affidavits, based on the ground that the grand jurors, who found the indictment, were not legally qualified to act, was properly overruled.
2. **PLEA IN ABATEMENT.** The plea in abatement is defective in lacking certainty and in presenting several issuable facts by the use of the disjunctive "or."
3. **COMMON LAW.** The common law rules relating to pleas in abatement have never been relaxed in this State.
4. **GRAND JURY. PLEADING.** Irregularities in the method of selecting, returning, or organizing the grand jury, are not waived by one bound up to the County Court to answer such indictment as might be found against him, by failure to challenge an objectionable grand juror at or before the organization of the panel. Objection to such irregularities may be raised by plea in abatement at or before the time the accused pleads to the indictment.
5. **COUNTY COURT; DISCRETION OF. GRAND JURY. TALESMAN.** The County Court in the exercise of reasonable discretion can discharge a grand juror for other than statutory causes and substitute a talesman, who is competent to act; thus, there being a question whether one of the grand jurors was qualified, the court discharged him and substituted a talesman; *Held*, that there was no error, although it was finally decided that the discharged grand juror was qualified.
6. **ACT OF 1884. NO. 111.** Under the Act of 1884, No. 111, s. 1, which provides that a person drawn to serve as a grand juror shall be disqualified from again serving "for two years from such drawing," it was *held*, that the disqualification commenced at the time of drawing, and not at the time of serving.

**INDICTMENT** for arson. Heard on motion to quash and demurrer to plea in abatement, filed December Term, 1886, at the May Term, 1887, Caledonia County, POWERS, J., presiding. Motion overruled and demurrer sustained. The cause was passed to the Supreme Court under section 1390, R. L. The prisoner had not been arraigned at the time the plea and motion were filed.

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The motion to quash alleged that the indictment was returned at the June Term, 1886, by a grand jury not lawfully summoned and not lawfully qualified; that one person, *viz.*: Reuben Ellis, who served in finding and returning the indictment, was not duly summoned and qualified to act; that the court without authority or legal right, discharged from the panel of jurors one Henry Hoffman, a grand juror then present in court, who was ready and willing to serve and was legally qualified to act. The court found the facts as stated in the affidavits in support of the motion. By these it appeared that the court discharged said Hoffman and appointed said Ellis as talesman to serve as grand juror; that said Ellis did serve as grand juror when the indictment was found against respondent; that said Hoffman served as grand juror at the June Term, 1884, and that he was summoned, etc., at the June Term, 1886, as grand juror and was willing to serve. The plea alleged in part: "Because he says, that one Reuben Ellis then and now a resident of the town of Sutton, in said County of Caledonia, did act and serve, as one of the grand jurors of said County Court, in finding and returning said indictment against him, said Thomas Ward, at the said June Term, 1886, of Caledonia County Court, aforesaid; that the said indictment against him, said Thomas, was found, and returned by the grand jurors of said county, into the County Court aforesaid, at its June Term, 1886, and was not found or returned into said court at any other term or time, of said County Court; that at the time when the said Reuben Ellis so acted and served in finding and returning said indictment as aforesaid, into said court as aforesaid, at the term aforesaid, he, said Reuben Ellis, was not duly or legally elected, qualified, empanelled, sworn or charged, as such grand juror, for the term aforesaid, and was not then and there duly or legally qualified to act or serve as such grand juror, at the term aforesaid, and in the manner aforesaid.

And the said Thomas Ward further saith: that the said Reuben Ellis did act and serve as such grand juror, of said County Court at its June Term aforesaid, in finding and returning to the court aforesaid at the term aforesaid, the said indictment; and that at the time when the said Reuben Ellis was summoned to appear and act as such grand juror, at the term

aforesaid, and at the time he did so act and serve as such grand juror in finding and returning said indictment, as aforesaid, at the term aforesaid, to the court aforesaid, said Reuben Ellis had not been duly or legally elected to serve as such grand juror, as aforesaid, by any town in said county, at the annual town meeting of the several towns, or any town of said county, at their annual March meeting, A. D. 1886; that said Reuben Ellis was at the time he was summoned, acted and served as such grand juror, and for a long time prior thereto, to wit, for ten years, had been a resident of the said town of Sutton; that at the annual town meeting of the said town of Sutton, held in March, 1886, the members of the board of civil authority of said town then present at such meeting did nominate as grand jurors of said town, for the year next following, the following persons, to wit: George E. Powers and Corydon Parker, as such grand jurors, and did not choose any other person or persons as such grand jurors, than the said George E. Powers and Corydon Parker, and that within five days after said annual town meeting, A. D. 1886, the clerk of said town of Sutton, to wit: John E. Willard, did return by mail to the clerk of said County Court aforesaid, to wit: Andrew E. Rankin, a certificate of the election of said Powers and said Parker as such grand jurors for the term of one year next after said annual meeting of said town of Sutton; and said Parker and Powers were at the time they were so chosen by said town of Sutton as aforesaid, at the annual meeting as aforesaid, 1886, and at all times between said meeting aforesaid and July 1, 1886, duly and legally qualified to serve and act as grand jurors for said County Court at the term aforesaid; and said Reuben was not at said annual meeting of said town of Sutton, nor that of any town in said county, at the annual meeting aforesaid, nor *that* of any other meeting, duly or legally nominated, elected or chosen as grand juror for said Caledonia County, nor was the name of said Reuben Ellis returned to clerk of said County Court by the town clerk of the said town of Sutton, nor by the town clerk of any other town in said county of Caledonia, as the legally elected grand juror of said town of Sutton or any other town in said county for the year following the annual town meeting held in March, 1886.

And the said Thomas Ward further saith: that at the annual



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town meeting of the legal voters of the town of Wheelock in said county, at its annual town meeting, in March, 1886, the board of civil authority then present did nominate, and the voters of said town did elect as grand jurors for the year next following, Ferdinand Darling and Henry Hoffman; that said Ferdinand Darling and Henry Hoffman were at the time of their nomination and election as aforesaid, and at the time of drawing grand jurors by the sheriff of Caledonia County as hereinafter set forth, in May, A. D. 1886, and at the time when said grand jurors met, on the first day of said June Term, 1886, and at all times between said March meeting, 1886, and the close of said June Term, 1886, duly and legally qualified to act and serve as such grand jurors within and for said county, and were physically able to attend said court as such grand jurors at any and all times during said June Term, 1886. And the said Thomas Ward further saith that the judges of said County Court aforesaid, in accordance with law, and prior to the said June Term, 1886, of said County Court, to wit: on the first day of May, 1886, did direct the clerk of said County Court, to wit: said Andrew E. Rankin, that the grand jurors who by law should hear, try, determine, find and return all criminal matters and indictments to said County Court at its said June Term, 1886, should be summoned and drawn from the several towns in said county as follows, to wit: That there should be drawn from the towns of Barnet, one; Burke, one; Danville, one; Groton, one; Hardwick, one; Kirby, one; Lyndon, one; Newark, one; Peacham, one; Ryegate, one; Sheffield, one; Stannard, one; St. Johnsbury, two; Sutton, one; Walden, one; Waterford, one; Wheelock, one; or in the entire county aforesaid eighteen (18) grand jurors were ordered to be summoned and drawn by the sheriff of the county aforesaid, to attend as grand jurors at the said June Term, 1886, as aforesaid. And the said Thomas Ward saith, that all said eighteen men so to be drawn as aforesaid, were to be such persons as the several towns of said county had elected at their several annual town meetings in year A. D. 1886, and the several town clerks of the said towns had returned to the clerk of said County Court as aforesaid.

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And the said Thomas Ward further saith, that according to the

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direction and order of the said judges of County Court, as aforesaid, the sheriff of said county, to wit: Lorenzo Sulloway, Jr., afterwards, to wit: on the 11th day of May, 1886, drew from the box prepared for that purpose at the county clerk's office of said county, at St. Johnsbury, in said county, and from the lists furnished by the several town clerks of the several towns aforesaid."

"And the said Thomas Ward further saith, that notwithstanding all said eighteen grand jurors so drawn, summoned, empanelled, charged and sworn as aforesaid, were duly and legally qualified to act and serve aforesaid as the legal grand jurors for said County Court and term aforesaid, the judges of said County Court, without the consent or knowledge of this respondent, and after all said eighteen persons had so appeared, been charged, empanelled and sworn as aforesaid, without authority of law, without legal disqualification on the part of any of the said eighteen persons, without the request of the person so discharged, as hereinafter set out, for the term aforesaid, and without any legal reason or cause, discharged for the term and sent away from the panel aforesaid, so legally drawn, summoned and appearing as aforesaid, Henry Hoffman as aforesaid, of said town of Wheelock, who had at the annual town meeting of said town of Wheelock been duly nominated by the board of civil authority of said town, and chosen by vote of said town as grand juror for the year next following, etc.

\* \* \* \* \*

"And this respondent refers to the indictment aforesaid and to the venire for grand jury at the June Term, 1886, and other records of the said county clerk, and makes the same a part of this plea.

"Without this, that the said Reuben Ellis was ever drawn, nominated, chosen, summoned, charged or sworn as grand juror for the term aforesaid and the county aforesaid, in any other manner or way than as above set forth.

"All this the said Thomas Ward will verify; wherefore, he prays judgment of said indictment, and that the same may be quashed."

The other facts are sufficiently stated in the opinion of the court.

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*Bates & May* and *Harry Blodgett*, for the respondent.

The plea was filed by leave of court; hence if not filed in season it is properly before the court. 10 Vt. 280; 12 Wheat. 479. Hoffman was not disqualified from serving. Under the act of 1884, the disqualification ends in two years from date of former drawing.

It must appear that the juror was incompetent, before the court can exercise the right claimed. 52 Vt. 366. Under the act of 1878, No. 35, Judge BARRETT decided that a grand juror drawn within two years was not disqualified. *State v. Cox*, 52 Vt. 471. See *United States v. Reeves*, 3 Woods, 199; 19 Pick. 368. Under the common law all citizens who were "men of credit and good standing," were eligible as jurors. Proffatt Jur. s. 44. Unless the statute has added another disqualification, such persons remain eligible. *Quinn v. Halbert*, 52 Vt. 353; *State v. Quimby*, 51 Me. 395; 38 Me. 200; 53 Me. 328. The act of 1884 could have no application to persons who had served before its passage,—Nov. 26, 1884. *Steamboat Farmer Co. v. McCrow*, 31 Ala. 659; *State v. Chaney*, 31 Ala. 342; 30 Penn. St. 156; *R. R. Co. v. Cilley*, 44 N. H. 578; 25 Vt. 41. The prisoner was deprived of a right given him by law. "Every indictment must be found by a grand juror legally selected, duly constituted and competent for the purpose." 36 Me. 130; *State v. Champeau*, 52 Vt. 313. The discharge of a grand juror without cause will render the action of the grand jury void. *Stokes v. State*, 24 Miss. 621; *Portis v. State*, 23 Miss. 578; *McQuillen v. State*, 8 Sm. & M. 587; *Van Hook v. State*, 12 Tex. 252; *People v. Geiger*, 49 Cal. 643.

But if Hoffman was incompetent the court had no authority to put Ellis upon the panel. *State v. Symonds*, 36 Me. 128; *State v. Rockafellow*, 6 N. J. L. 405; *State v. Easter*, 30 Ohio St. 542; 27 Am. Rep. 478; *State v. Davis*, 12 R. I. 704; 34 Am. Rep. 704; *State v. Jacobs*, 6 Tex. 99.

A grand jury "consists of the requisite number of competent individuals, selected, summoned and sworn according to

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the forms of law." *State v. Brown*, 10 Ark. 78; 1 Arch. Cr. Pract. p. 535 (marginal), 161; *Leathers v. State*, 26 Miss. 73; Proffatt Jur. s. 44.

The legislature gave to towns the authority to nominate and elect grand jurors, and took away all control of the court. R. L. s. 897; VEAZEY, J., in *State v. Brainerd*, 56 Vt. 532; Act of 1884, No. 111. See section 2 of said Act. The statute in plain words gave power to fill any vacancy as to petit jurors from bystanders. The legislature changed the law as to grand jurors. There is no law in our State by which a prisoner can challenge a grand juror. 1 Whart. Cr. Law. p. 381, s. 472.

The rule seems to be in these states where allowed, that the challenge to be exercised before indictment is found, goes only to the jury, and not to statutory disqualifications. *United States v. White*, 5 Cranch C. C. 457; *People v. Jewett*, 3 Wend. 314; *United States v. Hammond*, 2 Woods, 197.

In this State, the question can be raised by plea in abatement. *State v. Brainerd*, *supra*; *State v. Champeau*, *supra*; *State v. Cox*, *supra*; *State v. Emery*, 59 Vt. 84. See 2 Tyler, 384 (motion in arrest).

In other states both plea and motion are used; and such is the rule laid down in text writers. 1 Bish. Cr. Pro. s. 443 (1st ed.); 53 Ga. 73; 21 Am. Rep. 265; 15 Me. 104; 38 Me. 265; 3 Zab. 33 & 49; 11 Cush. 422; 33 N. H. 216; 61 Ala. 201; 33 Miss. 356; 3 Kan. 263; 34 La. An. 669.

If the plea states the objection in plain, unambiguous language, it is sufficient. Strict technical accuracy is not required. *United States v. Goulding*, 12 Wheat. 460; 66 Me. 142; 9 Rep. 388; 17 Ohio, 222.

Matters *dehors* the record properly come in. *Com. v. Leisenring* (Penn.), 10 Rep. 379; 1 Whart. Cr. Law, s. 472; *United States v. Gale*, 109 U. S. 65; 27 L. C. P. Co. 857.

The plea and proof fail to show that Ellis was a citizen

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even. A talesman cannot be drawn unless a grand juror fails to appear, and the bystander must have been nominated and elected a grand juror by some town within county, and his name found in the jury box. *Commonwealth v. Knapp*, 10 Pick. 477; Haw. P. C. 25. Incompetency of one grand juror vitiates the finding of the whole board; and the objection may be availed of by plea in abatement. 1 Bish. (3d ed.) Cr. Proc. s. 884; *State v. Symonds*, 36 Me. 128, is a case where an indictment, found by a grand jury, a part of which was drawn from bystanders, was quashed even after conviction. A motion in arrest was sustained in *Commonwealth v. Parker*, 2 Pick. 559, on the ground that a grand juror who had been summoned, gave way to another man, the constable assenting. This in effect overrules the case in 9 Mass. 107. The finding of the grand jury has been held void, where the venire had no seal: *State v. Fleming*, 66 Me. 142; *State v. Lightbody*, 38 Me. 200; *State v. Williams*, 1 Rich. L. 188; *United States v. Antz*, 16 Fed. Rep. 119.

Where the statute had not been complied with in summoning, etc.: *Findley v. State*, 61 Ala. 201; *Scott v. State*, 63 Ala. 59; *Berry v. State*, 63 Ala. 126; *Couch v. State*, 63 Ala. 163; *People v. Wintermute*, 1 Dak. T. 63; *People v. Southard*, 46 Cal. 141; *Com. v. Justices*, 5 Mass. 435; *People v. McKay*, 18 John. 212; *State v. Cantrell*, 21 Ark. 127; 3 Kan. 263; 4 Blackf. 736; 6 Blackf. 188.

Where a grand juror was an alien: *Cole v. State*, 17 Wis. 674; *Reich v. State*, 53 Ga. 73; 22 Am. Rep. 265; *State v. Davis*, 12 R. I. 492; S. C. 34 Am. Rep. 704; *State v. Brown*, 5 Eng. 71; *Com. v. Cheney*, 2 Va. Cases, 20.

Where grand juror was not a freeholder: *Com. v. St. Clair*, 1 Grat. 556; *State v. Duncan*, 7 Yerge. 271; *Barney v. State*, 12 Sm. & M. 68; *State v. Rockafellow*, 6 N. J. L. 405; 5 Porter, 484 and 130.

Nor a qualified elector: *Doyle v. State*, 17 Ohio, 222; *Cole v. State*, 17 Wis. 674.

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Where negroes were excluded: *Neal v. Delaware*, 103 U. S. 370; S. C. 26 L. C. P. Co. 567; *Bush v. Kentucky*, 107 U. S. 110; S. C. 27 L. C. P. Co. 354.

The plea was good in substance and form. 17 Ohio, 222; 26 Miss. 73; 23 Rep. 513.

*Henry C. Ide*, for the State.

1. The motion to quash was properly overruled: First, because it was based upon extrinsic matters not apparent upon the record. "Motions to quash reach only defects apparent on the face of the papers, and are not adapted to nor do they allow of, the joining and trial of any issuable fact thereon." *Landgrove v. Plymouth*, 52 Vt. 503.

"The illegal selection of the grand jurors is no cause for quashing an indictment on motion." 1 Whar. Cr. Law. s. 520; *State v. Hensley*, 7 Black. 324; *Bennett v. State*, 2 Yerge. 472; *State v. Tucker*, 20 Iowa, 508; *State v. Cole*, 19 Wis. 129; *State v. Fee*, 19 Wis. 562; *Wickwire v. State*, 19 Conn. 477; *State v. Foster*, 9 Tex. 65.

Second, because the quashing of an indictment is discretionary, and error does not lie in its refusal. *State v. Stewart*, 59 Vt. 273; 1 Whar. Cr. Law, s. 519; *Commonwealth v. Eastman*, 1 Cush. 189; *State v. Putnam*, 38 Me. 296; *State v. Hurley*, 54 Me. 562.

2. The demurrer to the plea in abatement was properly sustained: First, the respondent's dilatory pleadings were not filed within the time when such are allowable. Rob. Dig. 532.

It is error for the County Court to sustain dilatory pleadings not seasonably filed. Ross, J., in *Dow v. School Dist.* 46 Vt. 111; *Pollard v. Wilder*, cited in *Montpelier v. Andrews*, 16 Vt. 605. Such objection may be raised by demurrer. *Jennison v. Hapgood*, 2 Aik. 31. The arraignment of the respondent has nothing to do with the time of filing dilatory pleas. It should not occur until all dilatory matters are disposed of. 1 Whar. Cr. Law, p. 536.

Second, the plea is insufficient in form. The most strict and rigid rules of exact pleading are applied to pleas in abatement; and the slightest deviation or irregularity has always been fatal. A plea in abatement "must be pleaded with strict exactness." Whar. Cr. Law, s. 537; *State v. Emery*, 59 Vt. 84. Such pleas "for mere defects in the constitution of the grand jury \* \* \* are not favored." *State v. Duggan*, 3 New Eng. Rep. p. 135. The allegation that Ellis "was not duly or legally elected, qualified, impanelled, sworn or charged," does not present a traversable issue. No one can say whether the pleader intended to present an issue as to Ellis being "duly" elected, or "legally elected," or as to whether he was "qualified" or "charged." The same use of "or" is again made in the last line of the same paragraph. In other places in the plea there is a like confusing use of "or." An allegation is made that Ellis "was at the time he was so summoned," etc., when before that there was nothing in the plea to show that he ever had been summoned. There is an allegation that the board of civil authority, "did nominate" certain grand jurors, and "did not choose any other person." It is not the duty of the board to "choose" grand jurors. That is for the town to do. Sec. 2730, Revised Laws. But there is here no allegation of any action by the town.

Nor does it appear that Sutton ever elected or "chose" any grand jurors. Hence Ellis may have been legally appointed under section 2, Act No. 111 of 1884. This objection alone is fatal to the plea.

It is alleged that the sheriff drew out "the names of the eighteen persons before named," when twenty-five persons had been "before named."

Third. Irregularities in selecting and impanelling the grand jury, which do not relate to the competency of individual jurors, can in general only be objected to by challenge to the array. Whar. Cr. Law, s. 468; *Commonwealth v. Smith*, 9

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Mass. 107; *People v. Jewett*, 3 Wend. 314; 12 Tex. 252; Proffat Jur. s. 47; *State v. Howard*, 10 Iowa, 101; 20 Cal. 146; *James v. State*, 45 Miss. 572; Bac. Abr. tit. Juries; *Clawson v. United States*, 114 U. S. 477.

While the authorities are not uniform, yet the great current of authority is to the effect that a mere irregularity in the manner of selecting a grand juror, when the ground of objection does not question the competency or fairness of the juror, can not be taken advantage of by the plea in abatement.

A mere irregularity, or a nonobservance of some directory provision of law, is not available on a plea of abatement. 1 Whar. Cr. Law, s. 472 n; 2 Abb. Ct. App. 229; *Friery v. People*, 2 Keyes, 453; *State v. Brooks*, 9 Ala. 10; *Vanhook v. State*, 12 Tex. 252; *U. S. v. Blodgett*, 35 Ga. 336; *Lee v. State*, 45 Miss. 114; *People v. Jewett*, 3 Wend. 314; *U. S. v. White*, 5 Cranch C. C. 457; *State v. Gillick*, 7 Iowa, 287; *People v. Munahan*, 32 Cal. 68; *State v. Rickey*, 5 Halstead (N. J.) 83.

Fourth. But the plea is bad in substance and in its merits. It is apparent from it that seventeen regularly drawn and legally competent jurors acted in finding the indictment and, so far as appears, all of them voted in favor of the bill. If the contrary was true, it should have been alleged. The presence of Ellis was entirely immaterial and unprejudicial. *State v. Brainerd*, 56 Vt. 532.

Fifth. The plea is bad in substance. Ellis was not only competent, but was lawfully drawn. By the common law, the court in its discretion could discharge disqualified jurors, and direct the sheriff to summon others.

By 3 Hen. VIII. Chap. 12, it was among other things enacted that all panels of grand jurors "should be reformed by putting to and taking out the names of the persons so to be impanelled, by the discretion of the same justices before whom such panels shall be returned, and that the same justices shall command every sheriff, to put other persons in the same panels by their directions, and that the same panels so reformed by the said



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justices be good and lawful." Bacon's Abridgment, tit. Juries (A). This unrepealed statute is a part of our common law, and is undoubtedly the origin of the practice in this State.

The opinion of the court was delivered by Ross, J.

I. The motion to quash was properly overruled. It is based upon matters not appearing upon the record. It rests wholly on extrinsic facts, which could only be proved by parol evidence. No plea can be made to, and no issue joined upon, such a motion. It is an inappropriate mode of bringing such facts before the court. It should be founded upon facts appearing of record, or admitted and shown by the plaintiff's own proofs. *State v. Haynes*, 35 Vt. 565; *State v. Intoxicating Liquor*, 44 Vt. 216; *Waterford v. Brookfield*, 2 Vt. 200; *Culver v. Balch*, 23 Vt. 618; *Barrows v. McGowan*, 39 Vt. 238; *Landgrove v. Plymouth*, 52 Vt. 503.

II. The plea in abatement was clearly insufficient. It is lacking in the certainty required in such a plea. It is also defective in presenting several issuable facts, disjunctively, by the use of "or" as pointed out in the brief for the prosecution. Such pleading would multiply indefinitely the issues involved in a case, and lead to confusion and perplexity, instead of eliminating all extraneous matter, and narrowing the pleadings to a single determinative issue, which is the crowning merit of common-law pleading. The counsel for the respondent do not seriously contend that the plea is technically sufficient when judged by the rules of the common law, but contend, that strict technical accuracy should not be required; that it should be sufficient if the plea states the objection in plain, unambiguous language, and cite authorities in support of such rule. But the common-law rules have never been relaxed in this State, except by force of statute; and we have no statute relative to this class of pleading. The authorities cited are mostly from states in which the common-law practice does not prevail, and are not authority in this State. But it is unnecessary to give much attention to the technical form or

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substance of the plea. The counsel on both sides desire the opinion of the court upon the facts in substance, set forth in the plea and affidavits. The question thus presented is of practical importance, and has been considered carefully, although the case might be disposed of on the views already expressed. On the facts embodied in the plea and affidavits, the question is raised, whether in organizing and directing the proceedings of the grand jury, the County Court has any discretionary power to excuse jurors for causes not especially provided for in the statute, and to fill their places by ordering the sheriff to call talesmen. This was in effect what was done and is complained of by the respondent. This assumes that Hoffman was not disqualified by the Act of 1884. The prohibition of service by that Act is for two years from the time the juror was first drawn. A little more than two years had elapsed since the juror was before drawn, but not since he before served. There was a reasonable question whether the statute did not mean that two years should intervene between the terms of service. When this statute was called to my attention, I thought it was safer to excuse the juror, than to incur the risk of his being held disqualified under that Act, and so excused him and caused his place to be filled by a talesman (called by the sheriff), who was qualified to act as grand juror, if properly returned as such. I then thought as we now hold, that the statute, in terms, did not disqualify Mr. Hoffman from serving. Hence, if the court had no discretionary power in excusing him and ordering the sheriff to call a talesman, the action was erroneous. The prosecution contend that the objection to the discharge of Hoffman, and to the substitution of Ellis, relates only to the technical method of selecting the latter, and not to his competency. Such is the objection. It is nowhere alleged in the plea, nor stated in the affidavits which are referred to, and made a part of the plea, that Ellis was incompetent to act in the capacity of a grand juror, if properly selected and returned to the court. The prosecution has cited a number of authorities which hold that such an

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objection, by one bound up to the County Court to answer to such things as may be presented against him by the grand jury, is waived, if not taken advantage of in the organization of the grand jury; that the respondent should have challenged the grand juror or the array, when Hoffman had been discharged and Ellis substituted in his place. The decisions cited were controlled by statute, in some cases, and some cases are claimed to rest on the common law. But such a practice has never prevailed in this State, and has never been generally understood to exist. We think the better opinion is, that it did not exist at the common law. *Thompson & Merriam on Juries*, s. 507, *et sequens*. A passage in Hawkins' Pleas of the Crown seems to support the existence of the right (2 Hawk. P. C. 25, s. 16), but the correctness of this passage and the right were denied by the Court of King's Bench in Ireland on full discussion in 1811. 31 How. St. Tr. 543. Such has been the holding of the Supreme Court of Connecticut in a late case. *State v. Hamlin*, 47 Conn. 95. The early leading jurists in this State came from, and were educated in Connecticut, and gave to our State early laws and practice largely like those which existed in that State. The exercise of such right is attended with many inconveniences, if not inconsistencies. The proceedings of the grand jury are secret, and many indictments are found against persons against whom no antecedent proceedings have been taken. It cannot well be held that a person who did not know that any proceedings were likely to be had against him before the grand jury, by failure to object at the organization, waives any irregularity in the method of the selection, return, or organization of the grand jury. Neither is it quite consistent to hold that a person bound up to answer to such indictment as the grand jury might find against him, should before, or at the organization, object for irregularities in the method of selecting, returning and organizing the grand jury, or be held to waive the objection, when he has no right to be heard before that body in the proceedings there to be taken against him. We think that it

is the better, and more consistent practice which has heretofore, universally, so far as we are aware, prevailed, that such objections are not waived by one, bound up, by a failure to insist upon them at the organization of the grand jury, but that they may and must be taken advantage of by a plea in abatement before, or at the time, the accused first pleads to the indictment. As to irregularities in drawing, and disqualifications of petit jurors, which are somewhat analogous, see *Briggs v. Georgia*, 15 Vt. 61; *Mann v. Fairlee*, 44 Vt. 672; *Quinn v. Halbert*, 52 Vt. 353. A general plea to the indictment upon its merits would be inconsistent with, and a waiver of such dilatory plea. Hence, the question remains, had the County Court the right, in the exercise of its sound discretion, to discharge Hoffman under the circumstances, and cause Ellis to be substituted in his place? The objection to the exercise of this right, by the respondent, seems to rest somewhat on the ground that he had the right to have Hoffman act in that capacity. It was early, and recently, held by this court, that a party in a civil suit had no right to have one competent juror, first called, sit in his case, rather than another, and that he could not affirm that he had been legally injured by the substitution of one competent juror for another, in the reasonable discretion of the court. *Phelps v. Hale*, 2 Tyler, 401; *Quinn v. Holbert*, 57 Vt. 178. The action of the petit jury is much more binding and important in both civil and criminal cases, than is the action of the grand jury. The action of the former is in many respects final, while that of the latter is only initiatory. It would seem that the court should be more restricted in the exercise of the discretionary right to excuse a competent petit juror, and substitute another, than in the exercise of that right in relation to the grand jury. It has been the uniform practice of courts in this State to exercise this discretionary right and power in impanelling the petit jury in the trial of both civil and criminal cases. It is a discretionary right and power, like all other kindred rights and powers, to be exercised in good faith, with good judgment, in the furtherance of justice, but never capri-

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ciously; or arbitrarily, or for the furtherance of injustice. So far as informed the same discretionary right and power has been exercised in impanelling the grand jury. I am informed by Judge BARRETT that he always exercised it, and in so doing followed the, to him, well-known practice of Judge COLLAMER and Chief Justice REDFIELD. Judge POLAND, lately deceased, said that the practice had existed unquestioned, during the fifty or more years which he was conversant with the practice of the courts of the State. No decision is to be found denying the right and power. In many, it is indirectly recognized. *State v. Brainerd*, 56 Vt. 536; *State v. Cox*, 52 Vt. 471; *State v. Champeau*, 52 Vt. 313; *State v. Gravelin*, unreported Windsor Co. case. In *State v. Champeau*, it is plainly intimated, if irregularity enters into the drawing, or empanelling, of the grand jury, it must be shown to work a wrong or injury to be available. In *State v. Gravelin*, a petition for a new trial was prosecuted, in which it was shown, that a grand juror who acted in finding the indictment and a petit juror who participated in finding the respondent guilty of murder, were irregularly, and without the authority of law, drawn and summoned from the town of Chester, in that the person who drew and summoned them was a mere volunteer, wholly unauthorized to act in that behalf; and yet the petition was denied, the persons drawn being competent to serve in their respective capacities. In *Mann v. Fairlee*, 44 Vt. 672, the same doctrine was held in regard to summoning a petit juror. It is the duty of the court to order the drawing and summoning of both the petit and grand jurors, and to duly impanel them. This duty imposes on the court a responsibility which calls for the exercise of sound judgment and discretion. It has been generally held that the court charged with the duty of impanelling, either the petit or grand jury, was clothed with a discretionary power, in furtherance of justice, to excuse a competent juror regularly drawn, and to order a talesman called to fill his place; and that the exercise of such discretion is not revisable. Many circum-

stances may arise, such as the sickness or infirmity of the juror, or of some member of his family, or of some near friend, or some emergency in his business or property, which require the exercise of this discretionary power, to secure intelligent and careful deliberation and determination of questions involving the highest rights of property, of liberty and of life. Its exercise also frequently becomes necessary to accord to persons called to serve as jurors the commonest civilities. It has been generally exercised in favor of both grand and petit jurors. Thompson & Merriam on Juries, ss. 259 and 580, *et seq.*

There must be the same right to fill the place of the juror so excused as there is to excuse him. The one right involves the other, unless otherwise provided for. Otherwise a legal jury of either kind could not always be obtained. If such excuses should not reduce the number of the grand jury below a working quorum, they presumably reduce the strength and efficiency of a full panel, which the statute has given for the protection of the accused and of the State; of the accused, if innocent; and of the State, if he is guilty. If the number of the grand jury should be reduced to twelve, and the twelve should find, or fail to find an indictment, it does not follow that the action of the twelve would be the same, if aided by the counsels and deliberations of the other six required by the statute. To secure the full rights of the accused and of the State a full panel of grand jury should be secured when possible. This discretionary right and power should never be exercised arbitrarily, or without reason. Whether it comes to us, as a part of the common law, from 3 Hen. VIII. Chap. 12 as might appear, and as contended by the attorney for the prosecution (Bac. Abr. Juries A), need not be determined. It has been the recognized right of the court as practiced, so far as revealed by the reported decisions, and so far as the memory of the oldest practitioners can inform us, for nearly a century. In the meantime there has been no substantial change of the provisions of the statute relating to this subject. Tolman's Com. p. 79, s. 63; R. L. ss. 895 and 897. Such

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long and well-established practice, unquestioned by any decision of the court, and uninvaded by an act of the legislature should not be disturbed, because the courts of some other states, controlled more or less by code or statute, have held otherwise. If any serious inconvenience were to flow from it, it would have been made manifest long before now, and have been modified by proper legislation.

The result is that the respondent takes nothing from his exceptions, and the cause is remanded.

## MARY E. HATCH v. LURA E. HATCH'S ESTATE.

*Infant, Ratification of Contract by. Parent and Child.  
Administrator. Offset. Costs. R. L. s. 2127.*

1. A contract by which a debt is incurred by an infant may be ratified by his express promise to pay it, made after he becomes of age; and his acts and declarations, made or performed after he has attained his majority, with deliberation and knowledge of his rights, may be of a character to constitute perfect evidence of such ratification.
2. When a person on attaining his majority promises to pay a debt which he had contracted during his infancy, in the absence of any proof to the contrary, it would seem to be the natural presumption that he was aware of his rights.
3. A widowed mother cannot recover of the estate of her deceased daughter for an organ bought at the daughter's request made when she was about sixteen, and while living at the mother's home in the relation of parent and child, and there was no express promise to pay and nothing to distinguish it from the ordinary case where a parent indulges the request of a child.
4. Nor can such mother recover for nursing at her own home her daughter in sickness, although she was more than eighteen years old, but constituted one of the mother's family, and there was no understanding that charges should be made; nor for the payment of a physician's bill incurred by the daughter's illness; nor for the burial expenses of the deceased daughter,—as these last belong to the administrator to pay.
5. OFFSET. Under the statute—R. L. s. 2127—in an action against the estate of the deceased person, claims in offset are limited to such as existed at the time of the death of the intestate; otherwise, the due course of distribution would be altered.



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6. The plaintiff's husband devised a farm in unequal portions to her and to her two minor children, her son and the defendant's intestate. After the death of the husband, the mother rented the farm for several years on the shares, but she and the children lived thereon out of a common fund. The three constituted the family; and there was no understanding that any separate account should be kept, or separate contribution made towards their common support except the expenses of the intestate when at school; *Held*, in an action against the estate to recover for money loaned the intestate to complete her education, that the rent of the farm could not be allowed in offset.
7. The court declined to change the decision of the court below, in refusing to recommit the report,—on the ground that the record did not show error.
8. *COSTS*. On an appeal from the decision of commissioners, where their allowance was greatly decreased, the costs were properly apportioned.

APPEAL from the allowance of commissioners. Book account. Heard on the report of the auditor, September Term, 1886, Chittenden County, TART, J., presiding. Judgment that there be allowed the plaintiff the item of \$720.20 and interest, it being for the expense of the intestate's schooling; that there be disallowed of the plaintiff's account, items \$165.41 and \$172.38; and that there be allowed of the defendant's claim in offset of \$399.64, and interest.

The defendant filed a motion to recommit the auditor's report. Motion overruled and both parties excepted to judgment below.

The auditor found, in part:

Benjamin B. Hatch, husband of the plaintiff and father of the intestate, Lura E. Hatch, died in the spring of 1872, leaving an estate consisting of a farm of 140 acres in Jericho, appraised at \$8,000 by commissioners on his estate that year, and stock and other personal property used on the farm, appraised at the same time at \$1,550 also certain notes against other parties.

The farm has gradually decreased in value since 1872, and is now worth from \$3,500 to \$4,000.

He left a will by which he gave to two older daughters by a former wife \$800 each, which legacies were paid out of the personal property and the residue of his estate he gave in the following proportions: three-ninths to his widow, the plaintiff; two-ninths to his daughter Lura; and four-ninths to his son

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Fred, Lura and Fred being children of the plaintiff, and Fred being younger than Lura.

Plaintiff had a homestead of \$500 value in the farm and also dower therein, diminished by the value of the homestead, as the will did not profess to cut off homestead or dower.

After his death, his widow leased the farm on shares and lived thereon with her two children, Lura and Fred, until Lura's death, which occurred on the farm July 5, 1877, except a few months one fall, when they all lived in Montpelier, and except that Lura was away at school at Montpelier a part of the time. Since Lura's death, the plaintiff has carried on the farm with the aid of her son Fred. Lura became eighteen years of age December 15, 1874. As long as she lived she continued a member of her mother's family, her mother, her brother, and herself constituting the family, with no arrangement or understanding among themselves, that any separate account was to be kept in respect to, or any separate contribution should be made towards, their common expenses of living and support suitable to a family of their means and standing, with the exception of the arrangement for Lura's schooling, hereinafter stated, and no separate account was kept, or intended to be kept, or any charge made, or intended to be made, in respect to either their expenses or the income of their respective shares of the farm and other property. They lived together in one common home, mother and two minor children, as one family and one common fund. Their maternal and filial relations continued as they had existed from the children's early childhood, and each party contributed towards the common support of the family as a mother and her minor children ordinarily do, according to their ability and station in life, the mother directing and controlling their affairs. And the farm and its products, and the other property left by Mr. Hatch, were used, under the management of the plaintiff, for the common support of the family, including clothing and other incidental expenses.

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When Lura became of age in December, 1874, no change was made in their mutual relations and understandings, and no express contract of any kind was entered into between Lura and her mother in regard to support or service, but matters went along the same as theretofore until her death.

In the spring of 1873, when Lura was sixteen years old, she expressed the wish to go to a higher school than the ordinary common district schools which she had been attending, and acquire a thorough education, which she could only obtain at the higher academies or seminaries, and she asked her mother to be allowed to do so. Her mother said she could not afford to pay the expenses incident to such schooling out of the common fund or her own money, and Lura told her that she was willing that all such expenses should be paid eventually out of her own share of the property, and her mother thereupon consented that she might go to school as she desired, and agreed to advance the money for the expenses thereby occasioned, with the understanding that Lura should repay her therefor out of her own property. This arrangement, however, was not understood to change the general relation of one united family which had previously existed, nor the understanding and practice in respect to expenses and income above stated, except so far as concerned the expenses incident to her going away to school. Lura, when not away to school, was still to continue a member of the family, was to return home during her vacations, and they were all to continue to bear the same maternal and filial relations to each other as before except that the expenses incident to such higher education were to be paid eventually out of Lura's share.

Acting under this agreement, Lura attended one term in the spring and summer of 1873 at the academy at Jericho Center, where the family resided, remaining and living at home during that time. And on August 25, 1873, she went to Montpelier, and became a pupil of the Green Mountain Seminary there, and attended that school, with the exception of one term and

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probably a few weeks besides, until about the middle of March, 1877, when, her health failing, she returned to her mother's house in Jericho, and continued seriously ill there until her death, July 5, 1877. She used to return home at the vacations during this period, and spent at home the whole term and other parts of terms when she did not attend the seminary, and continued in all respects a member of the family, bearing the same family relations to her mother and brother as before.

\* \* \* She was well and faithfully nursed by her mother during her last sickness, and a physician was employed for her whose bill during such sickness, charged to and paid by the plaintiff, amounted to \$38.50, and the physician had a bill for attending her in 1876, amounting to \$1.50. This the plaintiff also paid, and the aggregate with interest from July 1, 1877, she claims to recover in this action. If the plaintiff is entitled to recover for such nursing and care of her daughter, she is entitled to recover \$5 per week amounting to \$70, with interest from July 1, 1887, and so also as to the physician's bill of \$40 with interest from the same time. The auditor is unable to find that there was any express contract by Lura to pay any of the expenses incurred by her mother for her, except those incident to her schooling at Montpelier.

\* \* \* Plaintiff had no other source of income except the farm and personal property connected therewith, belonging to Benjamin B. Hatch's estate, in which she owned such interest as she derived by the will, and the law bearing upon the above recited facts.

Edgar H. Lane was appointed executor of Mr. Hatch's will, and acted in that capacity until September 10, 1880, when he settled his account with the Probate Court, and resigned his trust. During his executorship he allowed the plaintiff to manage the farm and stock, and take the income and products thereof. It required \$598 to balance his account; that is, the debts owing by the estate, and the expenses of administration, and allowances to the widow, exceed the money he collected

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by that sum ; and in settling his account which was approved by the court and unappealed from, he treated that sum as rent received from the plaintiff for the farm during his executorship, and she paid him that sum to enable him to balance his accounts.

The auditor finds that in point of fact the rent or use of the farm and stock, which the plaintiff so occupied and had the benefit of was worth, after allowing the plaintiff towards the value of the property of the \$598 which she furnished aforesaid, \$225 per annum after July 5, 1877, when Lura died, until the time of this hearing before the auditor, April 3, 1886, in all say eight and three-fourths years, and that in some way or form of accounting the estate of said Lura is entitled to recover \$33.33 per annum of that time from the plaintiff. The other facts are sufficiently stated in the opinion.

*Wilbur & Wolcott*, for the plaintiff.

Judgment was properly rendered for the plaintiff to recover the \$720.20 advanced for Lura's education at the academy. The plaintiff was under no legal or moral obligation to furnish it from her small property after her daughter had received good advantages at the common school. The express promise of Lura to repay it was upon adequate consideration, and the contract was binding between the parties. It appears that Lura was desirous of obtaining, among other accomplishments, a musical education, and the mother purchased the organ at "her request." These agreements were fully ratified by the intestate after she became of age.

If a minor makes a contract that is simply voidable, and does not disaffirm it within a reasonable time after becoming of age, the contract becomes ratified. Lura used and treated the organ as her own for more than two and a-half years after attaining her majority. Tyler, Inf. 80, 83 ; 1 Chitty Cont. 11th ed. 216.

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In a case where the minor contracted to work for the defendant one year, and he continued in his service one month after he became of age, it was held to constitute a ratification. *Forsweth v. Hastings*, 27 Vt. 646.

The infant must disaffirm his contract within a reasonable time on coming of age, or he is bound by it. REDFIELD, J., in *Richardson v. Boright*, 9 Vt. 368. See *Bigelow v. Kinney*, 3 Vt. 353. *Fletcher v. Sumner*, 12 Vt. 28; *Baxter v. Bush*, 29 Vt. 465.

Taking a note against a third person by a minor for his work, and holding it eight months after he became of age, is a ratification. *Delano v. Blake*, 11 Wend. 86.

Where an infant purchased property and executed his promissory note therefor, and retained the property two years after he became of age, such retention was held to be a ratification. *Boyden v. Boyden*, 9 Met. 519.

The plaintiff should be allowed for nursing the intestate, and for what she paid the physician. These were for necessities, and there is an implied contract that Lura would pay them. *Doane v. Doane*, 46 Vt. 485.

A father holding a fund under a will for the support of his infant child, and able to maintain and educate her, may be allowed a reasonable sum for her support and education. *Kendall v. Kendall*, 60 N. H. 527.

On the death of the father a surviving mother is not under obligation to support her minor child, if the child has an estate of her own, or is able to earn a livelihood. *Englehardt v. Yung*, 76 Ala. 534; *Mowbry v. Mowbry*, 64 Ill. 382; *Wilkes v. Rogers*, 6 Johns. 590; 2 Fla. 360; 50 N. H. 505.

A widow is not bound to support her children unless of sufficient ability, and there is no finding in this case that plaintiff is. *Riley v. Jameson*, 3 N. H. 29; Reeves Dom. Rel. 283, 286; Rev. Laws, s. 2822; Schoul. Dem. Rel. 319, 321; *Whipple v. Dow*, 2 Mass. 515; *Dawes v. Howard*, 4 Mass. 97.

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The defendant's claim is not a proper offset in this suit. While the mother and children were living on the farm, no charges were made or intended to be made between them. There is no foundation for a claim for rents. *Clark v. Clark*, 2 New Eng. Rep. 213; 58 Vt. 527.

The account is a claim in offset, and not one that grows out of the contract in which the plaintiff's account accrued, but accrued to the defendant independently of it, since the intestate's death. The plaintiff is liable to pay it to the administrator. It is an asset. Rev. Laws, s. 2137; *Clark v. Clark*, *supra*; *Roberts v. Morgan*, 30 Vt. 319, 326.

An account due a party, which accrued before the death of the intestate, must be allowed and be paid *pro rata* with other creditors; but an account accruing to the estate since the decease must be collected by the administrator, and paid by him according to sections 2190, 2191, of the Rev. Laws. Otherwise it would be altering the due course of distribution of assets. *Aiken v. Bridgman*, 37 Vt. 249; *Harris v. Taylor*, 1 New Eng. Rep. 392; 53 Conn. 500; *Rees v. Watts*, 11 Exch. 410; Chitty Con. 6th ed. 884; 99 Pa. 188; *Dale v. Cooke*, 4 Johns. Ch. 11; *Nichols v. Dayton*, 34 Conn. 65.

The refusal of the court to recommit the report was correct. All the requests, so far as the evidence would warrant, were fully complied with. Rob. Dig. 306, ss. 17, 21.

*T. R. Gordon*, for defendant.

The plaintiff is not entitled to recover the item of \$720.20. The contract was made when Lura was a minor, and the report does not show anything which can be called a legal ratification. A ratification must be made with the deliberate purpose of assuming a liability from which the person knows himself to be discharged by law. Tyler, Inf. pp. 91, 94, 106; 1 Add. Cont. p. 270; *Smith v. Mayo*, 9 Mass. 62.

The alleged agreement and ratification were between mother

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and daughter. The relation was that of parent and child; and hence there can be no recovery except upon proof of an express agreement and ratification. *Ashley v. Hendee*, 56 Vt. 209; *Sprague v. Waldo*, 38 Vt. 141; *Lunay v. Vantyne*, 40 Vt. 501; *Davis v. Goodenow*, 27 Vt. 715; *Andrus v. Foster*, 17 Vt. 556; *Fitch v. Peckham*, 16 Vt. 150; *Sawyer v. Hebard*, 2 New Eng. Rep. 189; 58 Vt. 375; *Ormsby v. Rhoades*, 5 New Eng. Rep. 129; 59 Vt. 505.

The words in the report—"she wanted the arrangement to continue"—if of any legal force, can be construed to refer only to future expenses, and contained no renewal of a past promise. The case shows that no debt was created then, and that neither party understood that one was.

There can be no recovery for the organ. It was a gift, if Lura was the owner. Tyler, Inf. pp. 91, 106; *Sawyer v. Hebard*, *supra*.

Nor can there be any recovery for the physician's bill. It was paid out of a common fund, without any expectation of repayment. And there can be no recovery for the burial expenses. *Sawyer v. Hebard*, *supra*.

The defendant's account, or rather credit upon the plaintiff's account, was properly allowed to the extent of \$340.94; and an additional amount should have been allowed. These credits constituted payment *pro tanto* of the plaintiff's claim, and not an offset. The plaintiff, in taking the income from Lura's share of the real estate, reimbursed herself for moneys paid for Lura. But if the defendant's claim is viewed as an offset, it was properly allowed. The appeal vacated the action of the court below, and the parties are in the same situation that they would be in if the action had been commenced in the County Court. *Woodbury v. Woodbury*, 48 Vt. 94.

And if taking the income was payment, it was immaterial that it was taken after Lura's death.

The plaintiff had the defendant's money and property in her



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own hands, and so, from day to day, was advancing, not her own money, but Lura's for her schooling.

It is the duty of the administrator to plead an offset in a case like this. Rev. Laws, ss. 2117, 2125, 2170; *Martin v. White*, 58 Vt. 398.

In all accountings, the account is taken up to the time of audit. *Ambler v. Bradley*, 6 Vt. 119; *Pratt v. Gallup*, 7 Vt. 344.

The costs were properly apportioned. *Gilbert v. Earle*, 47 Vt. 9; Rev. Laws, s. 1451; *Watts v. Kavanagh*, 35 Vt. 34.

The opinion of the court was delivered by

VEAZEY, J. Exceptions were taken to the judgment rendered upon the auditor's report, in which the facts are concisely stated. The plaintiff was the mother of Lura E. Hatch, deceased, and claims to recover the items of her account in controversy on the ground of a contract between the mother and daughter while the latter was a minor of sixteen years of age, and a ratification of the same after she became of full age. The first item, including interest to September 1, 1886, was \$720.20, for money which the plaintiff paid for school expenses of Lura while attending academies.

We think the report shows a distinct agreement on the part of Lura to repay her mother for these expenses. Upon the facts reported the agreement was a natural one to be made, and was in its nature beneficial to the minor. The mother clearly could not afford to give her daughter the higher education which she desired. The latter had the means to be devoted to such use by the devise to her by her father, but not in ready money. The finding of the auditor is incapable of a fair construction other than of an agreement as above stated, when taken in connection with the circumstances existing when the arrangement was made.

The defendant relies mainly upon the claim that this contract was not ratified after Lura arrived at her majority. The

finding of the auditor is this: "After Lura became of age, and while still attending the seminary at Montpelier, she reiterated to her mother her desire to go to school there and her willingness to pay the expenses incident thereto from her own share, and referred approvingly to her former promise to that effect during her minority. She told her mother she wished this arrangement to continue as it had been before she became of age." There is no question but that the contract, by which a debt is incurred by an infant, may be ratified by an express promise to pay the debt, made by the infant, when he becomes of age, deliberately and with knowledge that he is not liable by law. To this extent the cases agree. Beyond this they are not entirely harmonious, at least in the enunciation of what is required to constitute ratification. As illustrations, see *Smith v. Mayo*, 9 Mass. 62, and *Whitney v. Dutch*, 14 Mass. 457.

There are many cases which hold that although an express ratification is necessary, yet it is not required to be in the form of an express new promise. *Tibbitts v. Gerrish*, 5 Foster (N. H.), 41, and *Harris v. Wall*, 1 Exch. 122, are examples. Acts and declarations of one after attaining majority, in favor of his contract, may be of a character to constitute as perfect evidence of a ratification as an express and unequivocal promise. Mere acknowledgment of the contract, or partial payment, will not alone be sufficient. There must either be an express promise to pay, or such a direct confirmation as expressly ratifies the contract, although it be not in the language of a formal promise. *Wilcox v. Roath*, 12 Conn. 551; *Gray v. Ballou*, 4 Wend. 403; *Whitney v. Dutch*, *supra*. The cases in Vermont have not recognized the necessity of an express promise in terms in order to constitute ratification of an obligation incurred during infancy. Where the declarations or acts of the individual after becoming of age fairly and justly lead to the inference that he intended to and did recognize and adopt as binding an agreement executory on his part made during

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infancy, and intended to pay the debt, then incurred, we think it is sufficient to constitute ratification, provided the declarations were freely and understandingly made, or the acts in like manner performed, and with knowledge that he was not legally liable. This proposition is clearly within the scope of decision in a long line of approved authorities, cited in Tyler on Infancy and Coverture, 2d ed. chap. VI., and 1 Am. Lead. Cases, p. 250.

The Vermont cases plainly warrant us in holding that the above conditions are sufficient. In *Bigelow v. Kinney*, 3 Vt. on p. 353, PRENTISS, Ch. J., says: "Though it is laid down that a bare acknowledgment or recognition of the contract of an infant, after he comes of age, without an express promise, will not, where the contract is for the payment of money, or the performance of some personal duty, and remains executory, amount to a ratification; yet in general, an express act done under a contract of his infancy, implying a confirmation of it, has been held to be sufficient." See also *Forsyth v. Hastings*, 27 Vt. 646. Regarding these conditions as not only sufficient but *required*, we think they are all covered by the finding of the auditor. Taking that which she said to her mother after arriving at full age and while still at the seminary, in connection with the unmistakable understanding between the parties during the infancy, and all the circumstances, the conclusion seems to us irresistible that there was a mutual understanding that Lura would not only repay her mother for the future advances, but would pay the past advances as she had first promised. She then called the first arrangement "her former promise," and told her mother she wished it to continue as it had been before she became of age.

When the minds of contracting parties meet and they both understand that by what is said it is intended that it should be taken as an assumption of an obligation and a promise to pay, it is the equivalent of a promise in terms.

There is no question but Lura spoke deliberately and without

duress in any form; and we think it is plain that she spoke understandingly as to her legal liability. It has been held that in the absence of any proof to the contrary, it is to be presumed, that at the time of making the new promise, the person, lately an infant, was aware of his rights. *Taft v. Sergeant*, 18 Barb. 321. This would seem to be the natural presumption. But however this may be, the language of Lura, under the circumstances in which it was spoken, imports such knowledge. It is difficult to see what should lead Lura to renew her promise as to the payments in her behalf during infancy except upon the theory of knowledge that such renewal was necessary to create legal liability. She was then at the seminary, her contemplated education incomplete, and no change from the previous condition except that she had attained her majority. She then brings the matter up, reiterates her desire to go on, and in effect renews her former promise so as to make the renewal applicable as to past as well as for future advances. She had the education which about two years in the academy would bring, after having passed through the common school. We come to the conclusion of her knowledge of the legal situation without hesitation.

The plaintiff further claims to recover for an organ which the auditor finds she bought for Lura in 1872, when the latter was about sixteen years old, at her request, and which Lura claimed and treated as her own from its purchase till her death in 1877; and it was so regarded in the family. Lura's home was always at her mother's, and the organ was kept there, except that Lura had it with her when away at school for a short time. The auditor says he does not find there was any express contract by Lura to pay any of the expenses incurred by her mother for her, except those incident to her schooling.

We think these findings are insufficient to warrant the holding of the relation of debtor and creditor between Lura and her mother. There was no appointed guardian, and they held the ordinary relation of parent and child. The only ground for hold-

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ing that the purchase of the organ created an indebtedness is that the mother bought it *at the request* of the daughter. While that might be sufficient as between strangers, we think it is not sufficient as between parent and child; especially in reference to such an article and under the circumstances shown in the report. There is not enough shown to distinguish the case from the ordinary one, where the parent indulges the request of a child.

The plaintiff also claims to recover for nursing Lura in her last sickness, and for the physician's bill. This claim is clearly without legal foundation.

Neither can she recover for the burial expenses of Lura. These belong to the administrator of her estate to pay. This case is an appeal from the allowance of commissioners on claims against Lura's estate, and the jurisdiction is limited to claims accruing during the lifetime of the deceased. *Sawyer v. Hebard*, 58 Vt. 375.

The defendant presented to the auditor an account against the plaintiff, containing an item for the use and occupation of that portion of the farm which Lura's father, who died in 1872, devised to her in his will. This item covered the whole period from the time of the father's decease to the time of this accounting, being about five years before Lura died, and nearly nine years since. The finding of the auditor as to how the farm was carried on and the home maintained by the mother and the understanding between her and Lura, plainly exclude all ground of claim for rent against the mother for the period prior to Lura's death.

The plaintiff objected to the allowance of that part of the item which accrued after Lura's decease on various grounds, one of which is that this claim is not one which grew out of the contract in which the plaintiff's account accrued, and did not accrue to the defendant under that contract but independently of it, and therefore cannot be allowed in offset to, or as credit against the plaintiff's account. The original contract which

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constituted the basis of the plaintiff's account was in substance and effect a loan of money to Lura. The claim of the defendant for the mother's use and occupation of Lura's share in the farm, after her decease, was independent of that contract.

In defining the power of commissioners appointed to receive and adjust claims, the statute, sec. 2117, R. L. provides that they "may try and decide upon claims which by law survive against or in favor of executors and administrators," etc., and "may set off such demands, in the same manner in favor of the estate." This plainly refers to claims existing at the time of the decease. The word *survive* indicates that. Again in sec. 2127, the provision is: "When a creditor, against whom the deceased *had* claims, presents a claim to the commissioners, the executor or administrator shall exhibit the claims of the *deceased* in offset," etc. This is in harmony with the previous section, and as plainly limits the offset to claims existing at the time of the decease. That which accrued afterwards had never accrued to the deceased person. That part of the rent which accrued after Lura's decease, accrued to her administrator as an asset of the estate, and came within the operation of those sections of the statutes which regulate the distribution of assets, ss. 2190, 2191. In *Aiken v. Bridgman*, 37 Vt. 249, the court said: "A defendant is not allowed to set off a debt due him from the plaintiff's testator against the debt which accrued to the plaintiff in his representative capacity after the testator's death; for this would be altering the due course of distribution of assets, and the defendant might be indirectly paid before the creditors of a higher degree." We think this rule and the reason of it applies to this case. Upon both principle and authority there is no mutuality in the accounts sought to be offset one against the other. *Harris v. Taylor*, 53 Conn. 500; *Stephens v. Cotterell*, 99 Penn. St. 188. The offset cannot be allowed.

This disposition of this item of the account in offset renders it unnecessary to pass on the question of homestead and dower.

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Hatch v. Hatch's Estate.

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It appears that when the executor of B. B. Hatch's will, settled his administration account he had a balance of cash \$58.34, belonging to the residuary legatees, and he paid the same to the plaintiff. The proportion of that belonging to the estate of Lura was \$12.85. The plaintiff still holds that fund and so far as appears must pay it with interest to the defendant. But it does not appear that it accrued to Lura while in life, and is not therefore a proper item of offset in this case.

Motion was made in the County Court to recommit the auditor's report, which was overruled, to which the defendant excepted. The ground of this motion was that the defendant filed several requests with the auditor to find and report facts involved in the defence and which the defendant had the right to have reported, but which the auditor did not report.

The difficulty with the defendant's point is that there is nothing in the record before us to show that the court was in error in refusing to recommit, even if the right of exception exists to such a ruling.

"Exhibit U," upon which the defendant's counsel mainly rely in support of this alleged error of the County Court fails to show the vitiating fact which they assumed was therein shown.

The plaintiff waives her exception to the ruling excluding her account books so-called. The apportionment of costs by the County Court was apparently warranted; and we do not think the disallowance of the offset affords reason for changing the order, in view of the large decrease from the allowance of the commissioners.

The judgment is reversed, and judgment is rendered for the plaintiff for the item of \$720.20 and interest thereon, and costs in this court; the cost previous to be apportioned. Let this judgment be certified to the Probate Court.

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In re Luther L. Durant.

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*In re* LUTHER L. DURANT.

*Criminal Law. County Clerk, Powers of. Warrant. Illegal Commitment. Practice. R. L. s. 1459. Perjury.*

1. The powers of the clerk of the County Court are *quasi* judicial; and he has authority under the statute—R. L. s. 819—to issue in term time or vacation, as circumstances may require, a warrant, in due course, without an express order from the judges, for the arrest of a person indicted, and for his detention for trial at the next term of the court.
2. It is not necessary that a warrant issued for the arrest of a person indicted, and for his detention for trial, should specify with particularity the accusation in the indictment; thus, a warrant is not defective, which was issued for the arrest of a person under indictment, where its language was “to answer to a complaint charging him with the crime of perjury.”
3. A person indicted for perjury may be lawfully committed to jail on a warrant issued in vacation for his arrest and detention for trial; but he is entitled to give bail.
4. The prisoner was arrested in one county and committed to jail in another county, where he was under indictment for perjury. In a few days afterwards he was discharged, but was immediately re-arrested by the same officer on another warrant issued for his detention for trial; *Held*, that if the first commitment was illegal under the statute—R. L. s. 1459—it did not effect the legality of the second commitment.

*Habeas Corpus.* Heard by VEAZEY, J., November 7, 1887, and passed by him, with consent of counsel, to the Supreme Court. Petition dismissed.

The first warrant issued against the relator was as follows :

STATE OF VERMONT, }  
 ORLEANS COUNTY, } ss. :

To any sheriff or constable in the State, greeting: By the



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In re Luther L. Durant.

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authority of the State of Vermont, you are hereby commanded to apprehend the body of Luther L. Durant, of Montpelier, in the county of Washington, and have him forthwith to appear before the County Court, in and for said county, at Newport, to answer to a complaint charging him with perjury. Fail not, and make due service and return according to law. Dated at Newport, this 14th day of September, A. D. 1887.

H. B. CUSHMAN,  
Clerk.

The following is a copy of the sheriff's return indorsed upon said warrant :

State of Vermont, ss. :

At Montpelier, in said county, this 28th day of September, A. D. 1887, I made service of this warrant on the within named Luther L. Durant by arresting his body ; read the same in his hearing, and on the same day committed him for safe keeping to the county jail in Newport, in the County of Orleans and State of Vermont, and left with the keeper of said jail within said jail a true and attested copy of the original warrant, with my return of commitment thereon indorsed.

Attest : . L. D. MILES,  
Sheriff.

The second warrant issued against the relator was as follows :

STATE OF VERMONT, }  
ORLEANS COUNTY. } ss. :

To any sheriff, etc., greeting: By the authority of the State of Vermont, you are hereby commanded to apprehend the body of Luther L. Durant, of Montpelier, in the County of Washington, and him safely keep so that you have him to appear before the County Court in and for the County of Orleans, at Newport, at the next regular term thereof, to be holden at said Newport on the first Tuesday of February, A. D. 1888, to answer to a complaint charging him with the crime of perjury. Fail not, and make due service and return according to law. Dated at Newport this 7th day of October, A. D. 1887.

H. B. CUSHMAN,  
Clerk.

The following is a copy of the sheriff's return indorsed on said warrant :

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In re Luther L. Durant.

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STATE OF VERMONT, }  
 ORLEANS COUNTY. } ss. :

At Newport, in said county, this 7th day of October, A. D. 1887, I then served this warrant on the within named Luther L. Durant by arresting his body, read the same in his hearing, and on the same day lodged him in the county jail in Newport aforesaid, for safe keeping, and on the same day left with the keeper of said jail, within said jail, a true and attested copy of this warrant with this my return of commitment thereon indorsed.

Attest : L. D. MILES.  
 Sheriff.

F. E. Alfred, Esq., State's attorney for Orleans County, was notified of the petition for the writ of *habeas corpus*, and of the time of the hearing before Judge VEAZEY.

The other facts are sufficiently stated in the opinion.

*T. J. Deavitt and Heath & Fay*, for the relator.

The law requires the commitment of a criminal to be made in the county where the arrest is made, if there is a jail in such county. Rev. Laws, ss. 1459, 1614; *Clayton v. Scott*, 45 Vt. 386; *State v. Malloy*, 54 Vt. 96.

The re-arrest at Newport was only a continuation of the wrong, and made the act a trespass *ab initio*. The first warrant did not authorize the commitment. *State v. Lamoine*, 53 Vt. 568.

There being no court in session when the second warrant was issued, the clerk had no authority to issue it. Rev. Laws, s. 817.

The relator being discharged from his arrest upon the first capias, is unlawfully detained, because the clerk had no authority to issue the second capias.

The relator is deprived of an opportunity to procure bail for six months. 10 Jones, 328; 2 Wm. Bl. 1204; *Rex v. Winter*, 2 T. R. 89; 107 Mass. 239.

The second warrant did not sufficiently apprise the relator of what he was to answer. He could not be lawfully arrested upon a complaint for perjury.

*F. E. Alfred*, State's Attorney, for the State.

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In re Luther L. Durant.

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The opinion of the court was delivered by

VEAZEY, J. This cause which is a *habeas corpus* proceeding was transmitted into the Supreme Court, under the statute, and was heard by the whole court.

It is agreed that the relator was indicted for perjury by the grand jury at the September Term of Orleans County Court, 1887; that upon the bill being returned and filed, a warrant for the arrest of the relator was immediately issued, signed by the clerk, while the court was in session, and was put into the hands of L. D. Miles, the sheriff of said county for service; that, on the 28th day of September, 1887, and after said court had adjourned without day, said Miles arrested the relator in Montpelier in the county of Washington, where he lived and where there was a legal jail, and took him against his protest to Newport, and committed him to the jail in Newport, in said county of Orleans for safe keeping; that at the time of said arrest the Washington County Court was in session at said Montpelier, and the relator demanded of said Miles that he be taken before said court or one of the judges thereof for the purpose of fixing and taking bail, but the same was refused by said Miles; that on the 7th day of October, 1887, said Miles discharged the relator from his said arrest, but immediately thereafter re-arrested him at said Newport on another warrant which had been put into his hands and which was dated on the 7th day of October, 1887, and was signed by said clerk, and again committed him to said jail in Newport for safe keeping; that the first warrant, which was issued while the Orleans County Court was in session as aforesaid, commanded to have the relator forthwith before that court to answer a complaint of perjury; that the said second warrant, which was issued after the adjournment of said court, commanded to safely keep the relator so as to have him before the said Orleans County Court at the next term thereof, to answer as before; that in these proceedings the relator consented to nothing; but protested, and waived no rights.

Upon the record consisting of the complaint, the writ, and return thereon, supplemented by the above agreed facts, it is insisted that the arrest and detention of the relator was illegal for several reasons.

One reason as alleged is, that there being no Orleans County Court in session when the last warrant was issued, the clerk had no authority to issue it.

Section 819, R. L. prescribes the duties of clerks, and in paragraph III. it says: "Record any other proceedings that the court may direct, and make and sign all process *regularly issuing* from either of the courts aforesaid, under the direction of the judges."

It is claimed in behalf of the relator, under this paragraph, that the clerk can issue no process except as expressly directed by the judges. This is against the practical construction which this statute has received.

Neither courts nor judges have been in the habit of expressly ordering clerks to make, sign and deliver to prosecuting officers or sheriffs, warrants for the apprehension of persons indicted, but they have been issued by the clerks as an authorized duty in regular course, without express direction.

When in this State as in many others, the first step in court against the suspected person is to be taken by the grand jury, this body *presents* to the tribunal a written accusation of his crime; which presentment, after being returned into court, and made a part of its record by order of the court, is called an indictment. The next step is the arrest of the person charged, if not already in custody, and he is brought in and the indictment read to him in open court, and he is required to plead to it. This is called the arraignment.

The warrant for the arrest is the process regularly issuing upon the indictment. The clause "under the direction of the judges" confers upon them the right to make orders, the right of supervision, but does not require an express order to invest the clerk with authority to issue a warrant for arrest in due

course. The statute requires clerks to make and keep dockets of causes pending, etc., and also to "record any other proceedings that the court may direct." The practice is for clerks to make a docket entry of each order of the court in a cause, and for courts to so direct; but I apprehend no clerk's docket in the State shows an entry of an order to issue warrants for arrest on indictments. The practice is the same in issuing executions in civil causes, and mittimuses in criminal causes. They are issued at the hand of the clerk, and usually, when regularly issued, without express order or docket entry of such order. The rendition and entry of the judgment on the docket has always been regarded as carrying with it all the authority which is required from the court to the clerk to issue such regular final process as the judgment warrants. When special action is warranted and taken, an appropriate order is made and noted. The clerk is an essential, constituent part of a court. 1 Bouvier, Law Dict. p. 325. He does not act independently of the judges but in conjunction with them, subject to direction and supervision, but having authority and duty prescribed by statutes; and his acts thus prescribed and performed in regular course in the progress of a cause, have force and effect as authorized acts without express order of the judges. So we hold that when the court receives the presentment of a grand jury and causes the same to be filed, and they become a record in court, which constitute an indictment, this carries with it all the order or authority which is required from the court to the clerk, taken in connection with the statute above quoted, to issue one or more warrants for the arrest of the person indicted; and to issue them in term time or vacation as circumstances may require. Without undertaking to define what, if any, may be the inherent authority of clerks under our system, we hold further, under said statute, construed in the light of other statutes appertaining to powers and duties of clerks, that when a proceeding is in progress which at a certain stage requires, in regular furtherance, that a warrant should be issued, it is the official province of the

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In re Luther L. Durant.

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clerk to issue the same without any order of the court to that end; that in short, the word "direction," in the clause "under the direction of the judges," is to be taken in the sense of authority to direct as circumstances may require, and not as requiring direction in order to confer authority upon the clerk to act. If this seems to invest clerks with *quasi* judicial power, it is not a new feature attaching to the office. At a very early day certain of the clerks of the Court of Chancery performed the duties which are now devolved upon masters in chancery.

They were to the number of twelve distinguished from clerks under them by the name of masters in chancery and were the assistants to the chancellor, who referred to them interlocutory orders for stating accounts, computing damages and the like. In process of time, as business increased, the clerk whose duty it was to keep the records, or as formerly called the rolls, became distinguished as master of the rolls. II Bouvier, p. 121. So our rules of court and statutes have long distinctly recognized the *quasi* judicial function in the clerk in various ways; and notably in the matter of assessment of damages and taxing of costs. The policy of legislation with us has been constantly to enlarge the powers of clerks.

It is further claimed that the warrant upon which the relator is held, does not sufficiently apprise him of that to which he is to answer. The language is "to answer to a complaint charging him with the crime of perjury." It is not claimed, as it could not fairly be, but that this would be sufficient but for the use of the word *complaint*. As to that, it is insisted that the relator could not be arrested lawfully upon a *complaint* for perjury and be held to appear before the County Court; because perjury is by our statute a felony and the proceeding must be by indictment, as the punishment may be by imprisonment more than seven years.

We do not think the word *complaint* in this warrant imports that the instrument charging the perjury is a technical complaint, as the term is used in the statute. The warrant would

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have been sufficient if it had omitted the word complaint or any corresponding word, and had read "to answer to the crime of perjury." The warrant is based upon the indictment and the naming of the crime in the warrant is sufficient, if necessary, which is doubtful, to identify the indictment, and for the purpose of fixing bail. Warrants have been in use in some counties back of all memory, and with approval of courts, and are now in use, which simply say, "to answer to a bill of indictment presented \* \* \* and filed \* \* \*" etc., without even naming the crime charged.

The object of the warrant is to bring the accused person into court to answer to whatever stands charged against him. We are unable to see what possible advantage could accrue to the arrested person to have the warrant specify with particularity the accusation.

It is further objected that the relator could not lawfully be committed to jail on this warrant. The warrant commanded to arrest, etc., and "safely keep so that you have him to appear" at the next term, etc. It has been repeatedly held in civil causes even, that an officer may use the common jail for the safe keeping of a person arrested under a *capias*, whom it is his duty to safely keep so to have him to appear at a time and place named. *Whitcomb v. Cook*, 38 Vt. 477. This objection is overruled.

It is also urged that the relator would be deprived of his liberty by the arrest in vacation, because not being committed for trial he could not give bail, there being no power in a judge to take bail except when committed for trial. This point is made upon false assumption. The arrest and commitment was for trial. Resort is to be had to the warrant to see the purpose of the arrest. That states with sufficient certainty for a warrant that the relator is taken and held for trial.

It is finally objected that the relator was unlawfully arrested on the first warrant in Washington County, and unlawfully taken out of that county to Newport, in Orleans County, and

that Sheriff Miles having participated in these alleged unlawful proceedings, cannot justify his subsequent action under the second warrant; that it was but a continuation of his previous illegal acts. The ground of claim that the first arrest and removal to Newport was illegal, is in substance that the first warrant did not authorize an arrest after the Orleans County Court, at the September Term, had finally adjourned; but if it did, the sheriff should have given the relator opportunity to give bail in Washington County as requested, or upon failure to give bail, should have committed him to the jail in that county; and this under section 1459, R. L., which provides that commitment shall be in the county where the arrest is made, if there is a legal jail in that county, unless otherwise directed by law.

It is unnecessary to pass upon this alleged illegality; because, assuming the claim to be sound, it would be no excuse for the sheriff to refuse to execute the valid process finally put into his hands. This point was so held in the recent case, *In re Miles*, 52 Vt. 609. The language of the court was: the sheriff's "duty was fixed by his office and the warrant, and it was obligatory upon him, however others, or even himself, might have violated law and duty in other respects," citing *State v. Brewster*, 7 Vt. 118.

The relator was at large at Newport at the time of the arrest under the second warrant; and being arrested there in the county where the court is held to which the warrant was returnable, it was clearly proper for the sheriff to resort to that county jail for safe keeping of the prisoner. We do not mean to imply that the same would not be the case even if arrested on such warrant as this in another county. That question is not here involved.

It is held that the relator is not unlawfully restrained of his liberty, and the petition is dismissed. Upon motion, the relator was admitted to bail.



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Stafford v. Vermont and Canada R. R. Co.

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## A. G. SAFFORD v. THE VT. AND CANADA R. R. CO.

*Attorney. Implied Assumpsit.*

The plaintiff was general attorney for the defendant railroad company, and in that capacity, but under specific directions from its president, he rendered services in several suits and was paid for the same, after he ceased by a tacit understanding to be such general attorney, and without having been employed as a special attorney, and without knowledge on the part of the defendant's agents, except its attorney, who had no authority to employ him, also rendered services of some value in the same suits; *Held*, that the plaintiff was discharged from all employment in the suits, and that he could not recover, even on the ground of implied assumpsit.

**BOOK ACCOUNT.** Heard on the report of an auditor, September Term, 1886, Chittenden County, TART, J., presiding. Judgment *pro forma* for the plaintiff to recover \$100. The plaintiff presented an account amounting to \$360 for term fees in certain cases pending in the courts of this State and of the United States. The auditor found in part: "At the annual meeting of the defendant company held about the middle of October, 1882, the plaintiff ceased to be such clerk and treasurer (William G. Shaw then being elected to such offices) and thereafter ceased to act as the general attorney of the defendant. He was not discharged as such general attorney by any act of the defendant or any of its officers, but it was the tacit understanding of the parties that he should no longer act as its general attorney."

Exceptions by both parties. The other facts are sufficiently stated in the opinion.

*Wilson & Hall*, for the plaintiff, cited *Langdon v. Castleton*, 30 Vt. 285; *Davis v. Smith*, 48 Vt. 52.

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*Wm. G. Shaw and Noble & Smith*, for the defendant, cited 2 Par. Cont. p. 676; 1 Wait Act. & Def. 245, 451, 465.

The opinion of the court was delivered by Ross, J.

The plaintiff, as an attorney at law, seeks to recover for services in several suits. For several years before October, 1882, he had been the clerk, treasurer and general attorney of the defendant. The suits in which he has charged for services subsequently to that time, arose while he was such general attorney; and those denominated amicable suits, were brought by his advice. In October 1882, by tacit understanding he ceased to be such general attorney. It is found that "the services of the plaintiff, in the suits named, prior to October, 1882, were all rendered under his employment as general attorney, but under specific directions from Mr. Brooks, the president of the company. It is not found that such specific directions changed the nature of his employment, nor, that he was ever employed, as a special attorney, in any of the suits. His employment in the suits in which the charges sought to be recovered were made, was therefore that of a general attorney, and when his employment, as general attorney ceased, his employment in the suits, in which his charges are made, also ceased. He could not thereafter properly appear, nor make charges in these suits on the ground of his employment therein. There are strong indications that the plaintiff in October, 1882, so understood it; for, he did not ask to be allowed to recover in a former suit, where they were recoverable, the first six charges in his present account, which accrued very soon after October, 1882. Nor does he give any reason for not seeking to recover those charges in that suit. Then also, his attachment in his suit of the very stock which the suits in which he has charged, were brought to protect from attachment by his advice, and his retainer in another suit, the legitimate object, and desired result of which was to render the object aimed at by the amicable suits nugatory, cannot well be

explained in harmony with an honest belief of further employment in the amicable suits. The discharge of the plaintiff, though tacit, as general attorney, discharged him from further employment in the suits in which his present charges are made, and so far as his actions speak, he then so understood it.

Nor can the plaintiff recover on the ground of implied assumpsit; that he has performed valuable services for the defendant with the defendant's knowledge, and without its objection; for, although upon the findings of the auditor the plaintiff's services would appear to have been of some value to the defendant, it is also found that they were performed without the knowledge of any of the agents of the defendant, except its then general attorney, who so far as is shown was without authority, either to employ or discharge him. These views are conclusive against the plaintiff's right to recover, without considering whether his action, in his own suit, and in accepting a retainer against the defendant in the Langdon suit, one, or both, were so far in conflict with his duty under an employment in the suits in which his charges are made, as to defeat his right to recover.

The judgment of the County Court is reversed, and judgment rendered for the defendant to recover its costs.

## GEO. L. PEASLEE v. MARY M. FLETCHER'S ESTATE.

*Will.*

Except in residuary clauses, general words in a will following words of a limited signification and coupled with them, are restricted to the same class of things as the former; thus, the testatrix gave by will to her uncle her "home place on Prospect street, in said Burlington, with my household furniture, and all my personal goods and chattels on said premises at the time of my decease," and the greater part of the residue of her estate to a hospital; *Held*, that the words "goods and chattels" did not include promissory notes and cash which were in the house or "home place" of the testatrix at the time of her death.

APPEAL from the decree of the Probate Court for the District of Chittenden. Heard by the Court, Chittenden County, September Term, 1886, TAFT, J., presiding. Judgment that the plaintiff was not entitled to the Manwell notes and cash on hand in the house or "home place" of the testatrix at the time of her decease. Mary M. Fletcher died, leaving a will, the clause of which in contention is set out in the opinion.

It appeared that the testatrix at the time of her death was possessed of a personal estate consisting mainly of United States bonds to the amount of about \$175,000; that she had some years previously given to the Mary Fletcher Hospital \$150,000; that she kept most of her money and government securities in different banks, retaining with her at her house on Prospect street, from \$500 to \$1000; that sometimes when she received treasury certificates from Washington in payment of interest on registered bonds she kept them for a short

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period at her house, and at the time of her removal to the hospital, as hereafter stated, she had in her house from \$1500 to \$2000 of these certificates; that she also had there seven promissory notes executed by one Manwell for \$1000 each, and also \$1100.18 in cash.

It was also the custom of the testatrix, to keep her promissory notes and that class of securities in her house; and at the time of the execution of her will, which was made when she was ill and expected soon to die, there was in the house besides the notes in dispute, other promissory notes amounting to about \$80,000, which were subsequently given to the hospital as part of the gift above named.

She was also in the habit of having certain United States bonds, which she owned after the making of her will, brought to the house from time to time where they would remain during the day that she might cut off the coupons.

She died in the hospital at Burlington a little before six o'clock in the evening of February 24, 1885, having been removed there from her house, about a mile distant, about two hours previously.

When she left her house on Prospect Street to go to the hospital, she had no expectation of ever recovering sufficiently to return to the house.

For years previous to her death the testatrix had been accustomed, occasionally, to leave her house and premises alone, generally for short periods; and on such occasions she for safety, took with her the Manwell notes, such cash and securities as she had in the house, and other portable valuables, such as her watch and jewelry, and to take them back with her to the house when she returned to it.

Before leaving the house on the occasion of going to the hospital she for safe keeping put into the hands of her male servant, who accompanied her to the the hospital, \$772 of the money which she had on hand at the house, and requested him to return to the house, after he had taken her to the hospital, for her other portable valuables, consisting of said notes, and

treasury certificates, her watch and jewelry, bank books, and the remainder of the \$1100.18 in money, and to bring them to the hospital where he also was to stay that night, intending, if she lived to go back to her house, to take with her several articles, including the \$772; and the servant returned to the house, obtained the articles, and started with them for the hospital; but before he reached there and while he was on the road about midway between the house and the hospital the testatrix died.

The plaintiff insisted that by the provisions of the will he was entitled to the Manwell notes and the \$1100.18. The testatrix had owned these notes for several years. They were payable to another person than the testatrix and to order, and were not endorsed.

*Hard & Cushing*, for the plaintiff.

The words "household furniture" do not so effect the words "all my personal goods and chattels," that they do not include cash and promissory notes. These words are not limited to things *ejusdem generis*. The disposition of judges of the present day is "to adhere to the sound rule which gives to words of a comprehensive import their full extent of operation, unless some very distinct ground can be collected from the context for considering them in a special and restricted sense." 1 Jar. Wills, 760. The decisions have not always been consistent with each other; but they have pretty generally been put upon the professed ground of executing the intent of the testator as gathered from the whole will, rather than upon any peculiar relation of the words. If it had been the intent to exclude from the operation of the bequest to the plaintiff this money and notes, it would have been easy by an exception, or by the use of words of narrower import, to have so indicated. Many of the cases bearing on this subject are cited and stated in Jarman on Wills, Vol. 1, 754, *et seq.* In the forest of these cases are the following, which fully sustain the proposition that there is no controlling force in the arrangement of words, and

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that the doctrine of *ejusdem generis*, at the present time, has no important influence in the construction of wills, and is not alone sufficient to warrant any restriction of the import of general words. *Parker v. Marchant*, 1 Younge & C. Ch. 290; S. C. 20 Eng. Ch. Rep.; HOAR, J., *Browne v. Cogswell*, 5 Allen, 556; Lord COTTENHAM in *Saumarez v. Saumarez*, 4 Myl. & Cr. 331; s. c. 18 Eng. Ch. Rep.

In *Church v. Mundy*, 15 Ves. 396, Lord ELDON said:

“I am strongly influenced toward the opinion that a court of justice is not by conjecture, to take out of the effect of general words property which those words are always considered as comprehending.”

That the \$1100.18 are included in the general words used, seems entirely clear. *Popham v. Aylesbury*, Amb. 68; *Chapman v. Hart*, 1 Ves. Sen. 271; 1 Roper Leg. c. 31, ss. 1, 2; *Spriggs v. Weems*, 2 Harr. & M. (Md.) 266; *Green v. Symonds*, (Redesdal es Ms.) cited in 1 Bro. C. C. 129; 2 Wms. Ex. 1273 n.; *Hearne v. Wigginton*, 6 Mad. 119.

Whether the notes pass to the plaintiff under the general clause, is not, on the authorities, clear, though there are decisions to the effect that they do.

It is true, she did not endorse them, as the testator did in *Lock v. Noyes*, 9 N. H. 430; but as the Manwell notes were payable to another person than the testatrix and were never endorsed by the payee, it would have been useless for the testatrix to endorse them. The case, *Lock v. Noyes*, although differing from the present, in the fact that there the note was endorsed by the testatrix, is nevertheless an authority against the doctrine that a *chose in action* will not pass under a testamentary disposition similar to the one in Miss Fletcher's will.

The authorities agree that when considered in the abstract, the words goods and chattels comprehend notes. “Every kind of movables” includes bonds. *Jackson v. Robinson*, 1 Yeates (Pa.) 101; 2 Wms. Ex. 1274. It is stated upon apparently good authority, that if negotiable instruments are payable to bearer, or if to order, and have been endorsed, then

they will pass under the designation of goods and chattels. 1 Roper Leg.; 2 Wms. Ex. 1274; *Webster v. Wires*, 5 Com. 569; *Benton v. Benton*, 63 N. H. 289; *Cook v. Bosinger*, 4 Mod. 156; *Sprigg v. Weems*, 2 Harr. & M. 266. Certainly this distinction seems more fanciful than real. 2 Wms. Ex. 1275. We insist that the plaintiff is entitled to the \$1100.18 and the notes. 6 Mass. 174.

*W. L. Burnap* and *Geo. W. Wales*, for the defendant.

Under the familiar rule for the construction of provisions of this kind in wills, neither money nor notes are included. Choses of action, not savoring of locality, do not pass under such a bequest. Wms. Ex. 1273. The bequest is not of all the personal property on the premises, but specific property is named, which designation even if it were coupled with general terms not qualified or restricted would limit these terms to things *ejusdem generis*, or herein, to things appertaining to the household affairs. 2 Wms. Ex. 1276. The general term "goods and chattels," is here modified and restricted by the word "personal" and the phrase "personal goods and chattels," is limited in its application to simply those articles peculiarly adapted to the personal use of the testatrix. "Where bequests are made by words of enumeration, followed in the same clause by collective words, or words of general description, the latter are confined to matters *ejusdem generis*." *Rawlins v. Jennings*, 13 Ves. Jr. 39.

In *Penniman v. French*, 17 Pick. 404, the words "indoor movables" were held to include only such things as were used about the house. In *Bullard v. Goffe*, 20 Pick. 252, the words, "all the residue of my furniture and estate whatsoever," were restricted to personal property. So it was held in *Dale v. Johnson*, 3 Allen, 364, that the words, "all my household furniture, wearing apparel, and the rest and residue of my personal property," did not include money, stocks, securities, or evidences of debt. It was also held in *Johnson v. Goss*, 128 Mass. 434, in a bequest of "all my personal prop-



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erty, my household effects, horses, carriages, life insurance," etc., that notes and stocks were not included. It was ruled in *Benton v. Benton*, 63 N. H. 289, where the will gave to the wife "every article of household furniture, books, etc., and every other article of personal property in and about said homestead," etc., that she did not take bank shares, notes and cash. The courts extend those general expressions so as to include notes and money only, when there is no residuary clause; and this construction has been adopted to prevent intestacy. 2 Jar. Wills, 364.

The opinion of the court was delivered by

TYLER, J. The only question presented by the bill of exceptions in this case arises in construing the following clause in the will of Mary M. Fletcher, late of the city of Burlington, deceased, or rather that part of the clause which relates to the bequest of the personal estate of the testatrix :

"I give to my uncle, George L. Peaslee of Auburn, Maine, my home place on Prospect street in said Burlington, with my household furniture, and all my personal goods and chattels on said premises at the time of my decease."

The plaintiff, who is the devisee mentioned in said clause, claims that the words, "all my personal goods and chattels on said premises at the time of my decease," are operative to pass to him seven promissory notes of one thousand dollars each, which the testatrix held against one Manwell, and eleven hundred dollars and eighteen cents in money, which were in the house or "home place" of the testatrix when she died.

In giving construction to this clause we must consider all the words contained in it; and also its relation to the other portions of the will in order to ascertain, if possible, the testatrix's real intention.

It appears by the bill of exceptions that she was accustomed to keep her promissory notes and other like securities in her house, and that at the time of the execution of this will, which was during an illness from which she did not expect to

recover, she had in her house, besides the notes in controversy, other promissory notes amounting to about eighty thousand dollars; also that she was in the habit of having certain United States bonds brought from the banks in the city, where she usually kept them, to her house, where they would remain during the day while she cut off the coupons.

It is true that the word "chattels" has a broad enough signification to include promissory notes and bank bills, and in many locations in a written instrument, it would be construed to include them; but in this case, if it had been the intention of the testatrix to bequeath to the plaintiff so large an amount of money and personal securities as was often in her house and liable to be there at her decease, it is hardly reasonable to suppose that she would have employed so general and inapt a term as "goods and chattels" for that purpose, when she obviously might have bequeathed them in unmistakable language. Had she intended to give her uncle all such promissory notes and money on hand, or any part thereof, it is fairly presumable that she would have said so plainly.

Again, we must consider all the language of the clause in question—the words, "my household furniture," as well as, "my personal goods and chattels," and determine, if we can, what relation the respective words bear to each other, whether or not the latter are restricted in their meaning by the former. The authorities on this point are numerous and somewhat conflicting; but we find that the general current of them, both in England and in this country, is, that except in residuary clauses, general words, such as "goods" and "chattels," when following after and coupled with words of a limited signification, are restricted to the same class as the former. Will. Ex. 1015, 1017, and cases cited. Thus, where the testator bequeathed to his niece all his goods, chattels, household stuff, furniture and other things, which should be in his house at A, it was decreed that cash found at the testator's house did not pass; for by the words "other things" should be intended things of like nature and species with those before

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specified. *Trafford v. Berrige*, 1 Eq. Cas. Abr. 201. Jarman, in his work on Wills, cites the case of *Lamphier v. Despard*, 2 Dr. & War. 59, where a testator, after devising certain real estate to his wife, bequeathed to her all his household furniture, plate, house linen, and "all other chattel property that he might die seised or possessed of," and after various legacies he appointed A his executor and residuary legatee. Sir Edward Sugden held that "all other chattel property" meant all *ejusdem generis*, relying partly on the subsequent residuary gift. He thought, however, that the words would clearly not pass money, so that the clause could not be a general bequest of the entire personal estate.

In *Rawlins v. Jennings*, 13 Ves. Jr. 36, the bequest was, "unto my wife, Alice Jennings, 200 pounds per year, being part of the moneys I now have in bank security, entirely for her own use and disposal, together with all my household furniture and effects of what nature or kind soever that I may be possessed of at the time of my decease." The Master of the Rolls said: "The second question arises upon the widow's claim of the whole residue of the personal estate, as passing to her under the general word 'effects'. That claim cannot be sustained. Part of his property being particularly given to her afterwards, the word 'effects' must receive a more limited interpretation, and must be confined to articles *ejusdem generis* with those specified in the preceding part of the sentence, viz.: household furniture."

In *Dole v. Johnson*, 3 Allen, 364, the testator bequeathed to his widow all his household furniture, wearing apparel, and all the rest and residue of his personal property. HOAR, J., in construing this clause, said: "We think the meaning of the whole will is made most consistent by restricting the word 'property' to chattels *ejusdem generis* with those enumerated. By this construction the widow will take absolutely the household furniture, wearing apparel and other chattels in and about the house of the testator, adapted to personal use and convenience, such as books, pictures, provisions, watches, plate,

carriages, domestic animals, and the like, but not including money, stocks, securities or evidences of debt."

In *Johnson v. Goss*, 128 Mass. 433, where the bequest was as follows: "I give to my wife all my personal property, my household effects, horses, carriages, life insurance, etc.," the court held that this general term, "all my personal property," was not used in its ordinary sense, that the language did not purport to bequeath the residuum of the testator's property, and, construing it in connection with the words immediately following, "my household effects," etc., that the testator's purpose was to describe property of the same kind, and that he used the adjective, "personal," as descriptive of chattels of personal use and convenience, not including stocks, securities, or other productive property.

In *Benton v. Benton*, 63 N. H. 289, the bequest was as follows: "I give my wife every article of household furniture, books, etc., and every other article of personal property in and about said homestead or wherever found belonging to my estate;" and under it the widow and the residuary legatees both claimed the bank shares, notes and cash on hand. The court held that the words, "every other article of personal property," were limited to the same class of things as those enumerated, and did not include the bank stock, notes and cash claimed by the widow.

Were there no residuary clause in this will, the words in question might and probably would be construed to pass this property to the plaintiff, for the reason that courts are always disposed to give the broadest meaning practicable to the words of a bequest when it is necessary to do so in order to prevent intestacy. The same is true when words of a general signification are found in the residuary clause itself, and for the same reason. Jarman, in commenting upon cases which indicate the disposition of judges of the present day to adhere to the rule which gives to words of a comprehensive import their full extent of operation, remarks, however, "that in all the preceding cases there was no other bequest capable of operating

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on the general residue of the testator's personal estate, if the clause in question did not. Where there is such a bequest it supplies an argument of no inconsiderable weight in favor of the restricted construction which is then recommended by the anxiety always felt to give to a will such a construction as will render every part of it sensible, consistent and effective."

Many of the cases cited by the plaintiff's counsel are upon the construction of residuary clauses in wills. Such is the case of *Parker v. Marchant*, 20 Eng. Ch. 290, where it was held that the words, "goods, chattels and effects," after an enumeration of various articles, carried the residue of the testator's property. The Vice Chancellor, in considering the point whether by these words the testator had disposed of the general residue of his personal estate or had so far died intestate, said: "This turns upon the meaning to be attributed to the words, 'goods, chattels and effects,' having regard to the position in which they are found in the will and having regard also to the whole contents of the will." Such also is the case of *Brown v. Cogswell*, 5 Allen, 556.

The will under consideration contains a residuary clause. After the bequest to her uncle the testatrix gave all the residue of her estate, except two small legacies, to the Mary Fletcher Hospital.

Upon these well recognized rules of construction, we hold that the words, "goods and chattels," in the connection in which they are found, should be construed as having only a restricted and limited signification and as not including said Manwell notes and cash on hand; that they are further restricted in their meaning by the word "personal," which indicates, when considered in its relations to the words, "household furniture," that the testatrix intended by the words in question to bequeath only other articles of the same kind, belonging to the house, "savoring of the locality," adapted and pertaining to her personal use. This view is sustained by the fact that no definite amount of money and notes was kept at the house. It often varied with varying cir-

cumstances, and the notes and money were carried away and brought back as the testatrix had occasion to go from or return to her home, and were being removed when she died.

To give these words the broad meaning claimed for them by the plaintiff would be to invest them with power by which they might have defeated what seems to have been the main purpose of the will, namely, the endowment of said hospital; for, at times nearly the entire personal estate of the testatrix was in her house.

In the view we have taken of this case the testimony of the plaintiff, received by the court below, was wholly immaterial. The result is the judgment of that court is affirmed, and certified to the Probate Court.

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In re Marron.

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*In re CHARLES W. MARRON.*

*Criminal Law. Prisoner must procure copies of Appeal at his own expense. R. L. s. 1763.*

The legislature has authority to make reasonable laws regulating the mode in which the right of trial by jury in criminal causes shall be enjoyed; but it cannot impair the right; thus, a statute which in effect requires a prisoner convicted in a justice's court, where a jury is composed of only six men, to procure copies of appeal at his own expense, if he appeals and would enter his appeal in the County Court, where a jury is composed of twelve men, is a reasonable regulation, and does not infringe the constitutional right of trial by jury.

**HABEAS CORPUS.** The writ was returnable before VEAZEY, J., May 17, 1887, and the case was by him adjourned to the Washington County Supreme Court, then in session. The relator was convicted by a justice of the peace of the crime of selling intoxicating liquors. Prisoner remanded.

The facts are stated in the opinion.

*Senter & Kemp*, for relator.

Article 10 of the Bill of Rights declares that "in all prosecutions for criminal offenses a person hath a right to \* \* \* a speedy, public trial by an impartial jury of the country."

The jury referred to here is the common law jury of twelve men, and such a jury and trial cannot be had under our law in a justice's court. Here the legislature enacted Rev. Laws, s. 1673, which gives a right of appeal to one convicted by a justice of the peace, unconditionally, except as to time. It is not made dependent upon the payment of any fees by the respondent, or the procurement of bail. *In re Kennedy*, 55 Vt. 1; Const. arts. 4, 10; Rev. Laws, s. 1673.

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The administration of criminal law in Vermont proceeds upon the theory that the State must furnish the machinery for the trial of all crimes and misdemeanors, and that no respondent shall be subjected to the payment of any fees or costs unless and until he be finally convicted; neither can a respondent recover any costs from the State; and if he be compelled to pay for his appeal and for the copies of the record in order to obtain an appeal, and the judgment from which he appeals be reversed after trial by a traverse jury in County Court, he cannot recover any fees or costs so paid. *State v. Wallace*, 41 Ind. 445.

The legislature could not abridge the constitutional right to a trial by jury, given to every person charged with crime; and, in order to give effect to this right, a respondent must of necessity be entitled to an appeal from a justice's court where a trial by jury may be had. *Johnson's Case*, 1 Me. 230; Bish. Writ. L. 90.

*E. W. Bisbee, State's Attorney, for the State.*

The statute casts the burden upon respondents appealing from the judgments of justices of the peace to enter their appeals in the County Court. Rev. Laws, ss. 1673-1678.

That involves the procurement of a copy of the proceedings in the justice's court, the fee for which is seventy-five cents. Rev. Laws, s. 4506.

The two courts had concurrent jurisdiction over the subject-matter. The relator desired to avail himself of a trial in the County Court, and asserted his rights to an appeal.

Where is the distinction between the expense of the copy of the proceedings before the justice, to get his case into the County Court, and the other expense to which he is subjected,—the procurement of witnesses, or counsel in his behalf, and the other incidental expenses of a trial?

The Constitution has placed about accused persons the guaranty of a fair trial,—not necessarily a free trial,—before a common-law jury.



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It is only when respondents are of insufficient pecuniary ability to properly present their defence that the courts grant them relief at the expense of the State.

The opinion of the court was delivered by

ROWELL, J. This is a complaint for a writ of *habeas corpus*. The case is this: The prisoner was convicted before a justice for selling intoxicating liquor, and appealed. Afterwards he seasonably applied to the justice for copies of appeal that he might enter his case in the County Court, which the justice refused to furnish him unless he would advance therefor the statutory fee of seventy-five cents, which he did not do, but applied to the County Court at its then next session for leave to enter his appeal, and for an order on the State's attorney to procure and file the necessary copies of appeal, which application was refused, and the case was not entered. After the adjournment of the County Court the justice issued a warrant to carry his judgment into effect, as provided by statute, upon which the prisoner was arrested and is now detained, and this imprisonment is complained of as illegal on the ground that the Constitution secures to the prisoner the right of a trial by a jury of twelve men, which he can have only in the County Court, and that by being required to pay for copies of appeal before he could get them he has been deprived of this right, which he says should be accorded to him by the State without money and without price.

The purpose of the declaration of the Bill of Rights, that in all prosecutions for criminal offenses a person hath a right to a speedy public trial by an impartial jury of the country, was, to announce a great and fundamental principle to govern the action of those who make and those who administer the law, rather than to establish precise and positive rules by which that action is to be governed. *Jones v. Robbins*, 8 Gray, 329, 340; *Foster v. Morse*, 132 Mass. 354.

But notwithstanding the right is secured by organic law, it is nevertheless considered that the legislature, in which is

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vested the supreme legislative power of the State, may regulate the mode and manner of its enjoyment, provided it does not impair the right itself. But from the very nature of the case no definite rule can be laid down that will be a guide in all cases to determine what will and what will not be deemed to impair the right. Every case must be determined upon its own circumstances.

Thus, in *Walter v. The People*, 32 N. Y. 147, 159, WRIGHT, J., speaking for the court, said: "Trial by jury cannot be dispensed with in criminal cases, but it is obviously within the scope of legislation to regulate such trial." There it was held that the legislature might give the people peremptory challenges in criminal cases. Again, in *Stokes v. The People*, 53 N. Y. 164, 173, it is said: "While the Constitution secures the right of trial by an impartial jury, the mode of procuring and impanelling such jury is regulated by law, either common or statutory, principally the latter, and it is within the power of the legislature to make from time to time such changes in the law as it may deem expedient, taking care to preserve the right of trial by an impartial jury." And in *Foster v. Morse*, 132 Mass. 354, it is said that the legislature has "authority to make reasonable laws regulating the mode in which this right shall be enjoyed and used."

So it has been held that a city charter was not unconstitutional because it did not provide for a trial by jury in criminal cases in the recorder's court. But for not giving a right of appeal to the accused it was held unconstitutional. *State v. Peterson*, 41 Vt. 504.

In most inferior courts, probably, either no jury trial at all can be had, or only one by a jury of less than twelve men, as in our justice courts; but it has always been held in such cases that if an unfettered right of appeal is given to a court in which a constitutional jury can be had, the right to a jury trial is not infringed. *State v. Peterson*, 41 Vt. 504, 522; *Sullivan v. Adams*, 3 Gray, 476; *Hopgood v. Doherty*, 8 Gray, 373.

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A statute requiring in a civil action that the defendant shall be defaulted unless within ten days of the return-day he files an affidavit of defence, has been held to be constitutional and not an unreasonable restriction of his right to a trial by jury. *Hunt v. Lee*, 99 Mass. 404.

It is to be noticed that the Bill of Rights gives a trial by jury in civil cases as well as in criminal. But it has always been held in civil cases that the advancing party must pay the jury fee in order to secure such trial.

In *Commonwealth v. Whitney*, 108 Mass. 5, the court says: "It has been the uniform practice of the legislature since the adoption of the Constitution, to pass laws regulating the mode in which the rights secured to the subject by the Bill of Rights and the Constitution shall be enjoyed, and if the subject neglects to comply with these regulations he thereby waives his constitutional privileges. The statute in question falls within this principle. It gives any person convicted before a justice of the peace or a police court the right to appeal to the Superior Court and to have a trial by jury, and makes regulations which are reasonable and necessary as to the mode in which he may enter and prosecute his appeal, and if he neglects to enter and prosecute his appeal he waives his right to a trial by jury, and the provision of the statute that he may thereupon be defaulted and sentenced is not unconstitutional."

So a statute that in effect provides that in civil cases a party shall not be entitled to a jury trial unless he files within a certain time a notice that he wants such trial, is constitutional. *Foster v. Morse*, 132 Mass. 354.

But it is unnecessary to pursue the subject further. The cases referred to sufficiently show the existence and general scope of legislative authority in this behalf, and illustrate with sufficient fullness the extent to which it may properly be exercised.

The result is, we hold that the statute which, in effect, makes it the duty of a respondent who appeals, to procure copies of appeal at his own expense if he would enter his

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appeal in the appellate court, is a reasonable regulation, not infringing the constitutional right of a trial by jury.

It is therefore adjudged that the prisoner is lawfully detained, and he is remanded to his former custody.

ROYCE, C. J., and POWERS, J., were absent.

## JOHN W. CLARK v. H. J. SNOW.

*Lost Note. Bills and Notes.*

The payee of an overdue negotiable note, payable to *order*, but not negotiated, can recover in an action at law, the amount of the note, although it is lost, and it is not shown to have been destroyed.

GENERAL ASSUMPSIT. Heard on a referee's report, September Term, 1886, Washington County, POWERS, J., presiding. Judgment on the report for the plaintiff. The case is stated in the opinion.

*Pitkin & Huse*, for the plaintiff.

In this State it is well settled that an action at law may be maintained on a lost promissory note, not negotiable or payable to order, but not negotiated. *Lazell v. Lazell*, 12 Vt. 443; *Hopkins v. Adams*, 20 Vt. 407; *Hough v. Burton*, 20 Vt. 455.

*Adams v. Edmunds*, 55 Vt. 352, is not in conflict with this principle but recognizes it.

*John G. Wing*, for the defendant.

Section 2005, R. L., does not apply, as this suit is against the original maker; and the parties stand on their common-law rights. There is a great difference between this case and those where the note has been destroyed. Where it has not been destroyed, he may be compelled to pay the note a second time. *Adams v. Edmunds*, 55 Vt. 352.

Suits to recover upon lost notes, which are negotiable, must

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be brought in courts of equity, which alone can require the plaintiff to secure the defendant by giving an indemnity. *Hansard v. Robinson*, 7 B. & C. 90; *Wain v. Bailey*, 10 Ad. & El. 616; *Price v. Price*, 16 M. & W. 231; *Pierson v. Hutchinson*, 2 Camp. 211; *Davis v. Dodd*, 4 Taunt. 602; *Crowe v. Clay*, 9 Ex. 603; 1 K. & J. 701; *Moses v. Trice*, 21 Gratt. 556; *Ex Parte Greenway*, 6 Ves. 862; *Bank of Va. v. Ward*, 6 Munf. 166; *Farmers Bank of Va. v. Reynolds*, 4 Rand. 186; 2 Daniels on Negotiable Instruments, s. 1475; *Adams v. Edmunds*, 55 Vt. 352.

The criterion of jurisdiction is not whether the note has been negotiated, but whether it is negotiable. 1 Pars. Cont. 324; 3 Add. Cont. s. 1282.

The opinion of the court was delivered by

ROYCE, CH. J. The referee finds, among other facts, that the note on which plaintiff claims to recover in this action was lost, that it had never been negotiated, and that it has never been paid. The note was payable to the order of J. W. Clark, was lost soon after its execution, and a copy of it was made and was proved before the referee. The note was not shown to have been destroyed.

The only question that arises for our consideration is, whether the plaintiff's remedy is at law, or whether he must go to equity.

It is said that "the mere loss of an instrument will not be sufficient to give equity jurisdiction, but the party must show that he has no remedy or no sufficient remedy at law." The loss "must obstruct the right of the plaintiff at law, or leave him exposed to undue peril in the future assertion of such rights." Bispham's Principles of Equity, s. 177. The main object of the equitable jurisdiction seems to be that a recovery may be had and at the same time the defendant may be indemnified against any possible liability growing out of the subsequent discovery of the lost instrument. Id.

We have already held that an action at law may be main-

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tained and is the proper action on a lost note not negotiable or not negotiated. *Lazell v. Lazell*, 12 Vt. 443; *Hopkins v. Adams*, 20 Vt. 407; *Hough v. Barton*, id. 455.

In *Lazell v. Lazell*, *supra*, it was decided that to defeat an action at law on a note, the defendant must show affirmatively that the note was negotiable and had been actually negotiated, or that it was payable to bearer so as to pass by delivery. In *Hopkins v. Adams*, *supra*, the grounds of the equitable jurisdiction were exhaustively considered by Judge REDFIELD in the opinion, where he says that in the case of promissory notes "not negotiable, or not negotiated, where the loser may sue at law, the principal ground of the jurisdiction must be the necessity of discovery and the accident by which that which the parties have constituted their contract has become incapable of performing its destined office."

It remains only to consider whether the recent decision in *Adams v. Edmunds*, 55 Vt. 352, is in conflict with the principle announced in the former decisions and ought to govern this case. The note there was payable to bearer, and a note so payable, as remarked in *Lazell v. Lazell*, passes by delivery. The consequence is that any finder might demand payment, and against such liability to an unknown finder the maker should be indemnified. But the maker is subjected to no such risk in the case of a lost note payable to order and not negotiated; for if ever found, it can not be negotiated by any one; not by the payee, for he has been paid, nor by a third party, for that would presuppose the commission of a forgery, which the law will not presume.

Another consideration to be borne in mind in this connection is that the note in suit, being on demand and the statutory period of sixty days (R. L. sec. 2013) having long since expired, is overdue, and any one into whose hands it might come, by finding or otherwise, would hold it subject to all the infirmities of such paper. He would take only the rights of his assignor and could not be a *bona fide* purchaser.

We can not see how the defendant will be subjected to any

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risk by the payment of this note, and so do not consider him entitled to indemnity ; and as no other objection is urged to the law jurisdiction, we must hold that the action is well brought.

No question was made as to the plaintiff's right to recover on the item of book account proved before the referee.

So that the judgment of the County Court for plaintiff to recover both items named in the report with interest on the same and costs is affirmed.



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Harvey v. National Life Insurance Co.

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## DANIEL HARVEY v. NATIONAL LIFE INSURANCE CO.

*Usury.*

1. In 1873 the plaintiff executed a mortgage on his farm to secure his note given to the defendant for \$1000 payable in five years with interest; and upon receipt of the note and mortgage the defendant counted out to the plaintiff \$1000 and then took from the sum \$100, being the usury agreed upon. The note was paid in 1879 by one who had purchased the premises and assumed its payment as a part of the purchase; *Held*, that the counting out the \$1000 was a mere device; that the \$100 entered into and became a part of the note; that the payments made by the plaintiff and those by the purchaser were to be applied in liquidation of the legal portion of the debt; and as the suit was commenced within six years from the payment of the note, the Statute of Limitations was not a bar.
2. But an overcharge of \$12 for examining the property offered as security, was not usury; and the money thus paid was due when the examination was completed, and the Statute of Limitation began to run upon it.

ACTION to recover usury. Heard on a referee's report, Chittenden County Court, September Term, 1886, TAFT, J., presiding. Judgment *pro forma* for the plaintiff to recover \$232.87. Exceptions by the defendant.

It appeared that the \$1000 note and mortgage were executed February 14, 1873; that the note was payable in five years from its date with annual interest; that the plaintiff paid the defendant as interest \$60 on February 14, 1874, and the same in 1875; that the plaintiff sold his farm on the 14th day of June, 1875, to Catharine Hardaker, who assumed the payment of said mortgage, as a part consideration of the payment of the purchase money; that said Hardaker paid to the defendant the interest on the note at six per cent each year, and on May

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29, 1879, she paid the principal. It was found that the \$18 transaction for examination of the property was had in good faith and not intended to cover usury. The other facts are sufficiently stated in the opinion.

*Pitkin & Huse*, for the defendant.

The \$18 was not usury in any view. *Smith v. Walf*, 55 Iowa, 555; *Hutchinson v. Hosmer*, 2 Conn. 341.

There was no usury in the note. The plaintiff had \$1000 and paid \$100 of it to the defendant, "being the usury agreed upon," and \$12 overcharge for expenses. He understood that the transaction was just what it was, and slept till his rights were gone. *Davis v. Converse*, 35 Vt. 503; *Lamoille Co. Bank v. Bingham*, 50 Vt. 105; *Spaulding v. Davis*, 51 Vt. 77; *Wells v. Robinson*, 53 Vt. 202. Whatever Mrs. Hardaker paid beyond what was necessary to take up the note according to its terms was her business. There can be no recovery for any usury paid for keeping the loan on foot after February 14, 1878. Even on the basis of the judgment below, calling the sum loaned \$900, the judgment should be for only \$207.67.

*S. H. Davis*, for the plaintiff.

The usury paid was included in the note. Rob. Dig. 735, s. 45; *Davis v. Converse*, 35 Vt. 503; *Grow v. Albee*, 18 Vt. 540; *Nelson v. Cooley*, 20 Vt. 201; *Ward v. Whitney*, 32 Vt. 89; *Ward v. Sharp*, 15 Vt. 115. In this last case, REDFIELD, J., said:

"Payments made in pursuance of an usurious contract to an amount within the debt and legal interest are to be regarded as payments generally."

All that the plaintiff and Mrs. Hardaker paid prior to the last payment are to be treated as payments on the principal; so that the usury was really included in the last payment. POLAND, J., in *Ward v. Whitney*, *supra*; Ross, J., in *Wells v. Robinson*, 53 Vt. 202; *Phelps v. Bellows*, 53 Vt. 539.

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The plaintiff can recover all usury paid by himself and by Mrs. Hardaker. *Spaulding v. Davis*, 51 Vt. 77; *Reed v. Eastman*, 50 Vt. 67; *Low v. Prichard*, 36 Vt. 183. The \$12 paid for expenses was usury. *Williams v. Wilder*, 37 Vt. 613.

The opinion of the court was delivered by

Ross, J. The parties do not disagree in regard to what is the established law of this State touching the right of the plaintiff to recover, but do disagree in regard to its application to the facts found by the referee. If from what transpired February 14, 1873, the \$100 usury entered into the plaintiff's note of that date for \$1000, and its payment was secured by the mortgage then executed, it is conceded by the defendant, that the plaintiff's right to recover it back did not accrue until the note was paid May 29, 1879, in which case, the Statute of Limitations had not run on his claim. But if the \$100 usury was paid to the defendant February 14, 1873, the plaintiff's right of action to recover it back then accrued, and was barred by the Statute of Limitations when this action was commenced. The finding of the referee is: "Upon the receipt of the mortgage and note the defendant counted out to the plaintiff one thousand dollars, and then took from said sum, one hundred dollars, being the usury agreed upon by the parties." This falls short of finding that the \$100 was delivered to and received by the plaintiff as his own money. As the result of that transaction the plaintiff went away with nine hundred dollars in money—all he had ever received from the defendant as his own money—and the defendant with the plaintiff's note for \$1000. It is apparent that the counting out to the plaintiff of one thousand dollars, was no more than a device, at most. As between the parties it was not understood, nor intended, as a surrender by the defendant to the plaintiff, of the one hundred dollars and all right and title to it. Hence, the one hundred dollars usury entered into, and became a part of the mortgage note. The payments made by

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the plaintiff, and by Mrs. Hardaker prior to the time of the taking up of the note, would, in law, be applied towards the payment of the legal portion of the note. The plaintiff remained holden upon the note until it was taken up. He sold the premises upon which its payment was secured to Mrs. Hardaker, and she agreed, as a part of the purchase, to pay this note. Her payments on the note were therefore by his procurement, and out of his property which he left in her hands for that purpose. In legal effect, they are his payments made by his procurement and direction, but by the hand of Mrs. Hardaker. We do not think the excess above the interest on the sum legally due paid by her after the note fell due, stands in law differently from those made by her before that time. All the payments made by her, as well as those made by the plaintiff, up to the final payment, were, in law, to be applied towards the liquidation of the legal portion of the note. Hence, the plaintiff is entitled to recover, what was paid as the final payment of the note above what was then legally due upon the note after applying the payments made thereon in liquidation of the legal portion of the note with interest. The computations of the counsel too nearly agree to require a further computation to ascertain this sum. It is \$207.67.

The twelve dollars for which recovery is claimed stands differently. It was not usury on the facts found by the referee, but money paid to an agent by the plaintiff, for going and examining the property which he was offering as security for the payment of his note. It was paid, not to the defendant, at least in the first instance, but to the agent, and if at all to the defendant, such fact is not directly found by the referee. By the arrangement, if the agent on that trip examined other properties offered as security, for which he was paid, the sum which the plaintiff paid him was to be reduced proportionally. It is found that from such other examinations, the sum should have been reduced twelve dollars. This did not in any way enter into the \$1000 note, but was a debt due the plaintiff from the defendant, arising out of the arrangement for the examina-

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tion of the property which he offered as security. The twelve dollars became due the plaintiff as soon as the examinations made on that occasion were completed. The plaintiff's right of action to recover it then accrued, and the Statute of Limitation began to run upon it. On this view, his right to recover the twelve dollars was barred by the Statute of Limitations long before the commencement of this action. This disposes of all the questions raised by the exceptions.

The judgment of the County Court is reversed and judgment rendered for the plaintiff to recover \$207.67 with interest since September 21, 1886, with his costs, except in this court, lessened by the defendant's cost in this court.

EPHRAIM THAYER v. CENTRAL VERMONT RAIL-  
ROAD CO.*Practice. Reference. New Trial.*

1. A motion made in the County Court to re-commit a referee's report on the ground that he erred in finding facts, is addressed to the discretion of the court; and its decision thereon is not revisable, where the case shows that the referee had some evidence properly before him to sustain his findings.
2. If the finding of the fact by the trier can be supported upon any rational view of the evidence it should stand; and a new trial will never be granted, on the ground that the finding is merely against a preponderance of evidence; or on cumulative evidence, which would not be likely to make a substantial change in the results, and where no sufficient reason is assigned for its non-production at the first trial.

ASSUMPSIT. Heard on report of referees at December Term of Orange County Court, 1885, ROWELL, J., presiding. Motion to re-commit overruled and judgment on the report for the plaintiffs to recover \$2942.58 as damages and costs. Exceptions by the plaintiff. The motion to re-commit was on the ground "that the report finds as facts matters that are inconsistent with each other, in this; that they find that Luke Tarbell had no other interest or rights in said 419 cords of wood than that given him in the bond from the plaintiffs; and they find that Luke Tarbell with the knowledge and consent of Ephraim Thayer sold 419 cords of wood to Daniel Tarbell;" and also as stated in the opinion, that the referees erred in disallowing the plaintiff's charge for 419 cords of wood. The referee found that it appeared that in July, 1882, the parties

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to this suit entered into a verbal contract by which the plaintiff agreed to deliver to the defendant all the wood that he could, but no definite amount was determined upon and defendant was to pay as much as it paid anyone.

It was also found that the plaintiff under this contract delivered many cords of wood, and as to the wood in contention substantially as follows: "Said plaintiff had a quantity of wood in the Roxbury Lumber Company's mill yard in June, 1883, amounting to 419 cords. And we further find that Luke Tarbell sold and delivered said lot of wood on board the cars to Daniel Tarbell and removed by said Daniel Tarbell to the sheds in Randolph and So. Royalton, and by said Daniel sold to the defendant. And we also find from testimony of said plaintiff and Luke Tarbell and a bond and contract from said plaintiff to said Luke Tarbell (a copy of which is hereto attached) that said Luke Tarbell had an interest in said wood and its sale.

\* \* \* That the Roxbury Lumber Company mill yard was owned by D. Tarbell and was leased by him to this defendant. That the 419 cords of wood were delivered into said yard under said contract of July, 1882, and when so delivered said lease was in force, and defendant in possession under said lease. That Luke Tarbell had no other interest or right in said 419 cords than that given him in the bond from said plaintiff to said Luke Tarbell; that the title to the land on which all of said wood grew was in the plaintiff.

The 419 cords were measured for said Daniel Tarbell, August 13, 1883, and on settlement between Daniel Tarbell and the defendant, November 17, 1883, and was adjusted on their settlement aforesaid. Plaintiff gave notice to defendant that the wood was his November 1, 1883.

At defendant's request we further find:

That Luke Tarbell, with the knowledge and consent of Ephraim Thayer, sold to Daniel Tarbell the wood piled in the sheds at Randolph and Royalton as aforesaid, and that Thayer, knowing of such sale and knowing of Luke Tarbell's adjustment thereof, as indicated by schedule C, did not object or

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dissent therefrom, November 1, 1883, but took and retained exhibit C and still retains it."

The contract attached to the referee's report was dated December 18, 1880, and signed by the plaintiff and Luke Tarbell.

By this contract the plaintiff agreed to pay said Luke \$300 for each 100 cords of wood he should cut on the plaintiff's farm and deliver on to the railroad; and the defendant agreed: "And I, the said Luke Tarbell, do hereby agree to move on to the farm and take charge thereof without pay from said Thayer, and whatever wood I manufacture from said farm is to be and remain the property of the said Thayer until he shall make conveyance of the said farm to me according to his bond to me of this date. And I hereby agree that I will not sell or otherwise dispose of any wood so by me manufactured as aforesaid."

*S. C. Shurtleff, George M. Fisk and J. D. Dennison*, for the plaintiff.

The finding of the referees as to what the contract was, is conclusive. But the report shows that the referees allowed what they thought the wood was worth. For this reason the report should be set aside. The finding of the referees are contradictory and in such case the report should be set aside. *Briggs v. Georgia*, 12 Vt. 60. As to new trial, see *Walden v. Clark*, 50 Vt. 383.

*Lamb & Tarbell and J. J. Wilson*, for the defendant.

If the report was wrong it should have been attacked in court below by exceptions. The plaintiff waived all objections to the report through failure to file exceptions. *Fuller v. Wright*, 10 Vt. 512.

The opinion of the court was delivered by

TYLER, J. This is an action of assumpsit brought to recover for a quantity of wood. Trial by referees under a rule of court and report made to the June Term, 1885, of the Orange



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County Court. At the December Term the plaintiff filed a motion to re-commit, claiming that the referees erred in disallowing his charge for 419 cords of wood which he sought to recover, they having found that the wood had been sold by one Luke Tarbell to Daniel Tarbell with the knowledge and consent of the plaintiff, and that Daniel Tarbell had sold the same to the defendant; also claiming that the findings of fact on this point were inconsistent with each other and against the evidence. The motion was supported by affidavits and by transcripts of the testimony taken at the trial. The court overruled the motion to re-commit, accepted the report and rendered judgment thereon for the plaintiff for a less sum than was claimed by him, to which judgment he excepted.

The motion to recommit was addressed wholly to the discretion of the court below upon the evidence therewith submitted. No question of law is raised upon the decision of that court, apparent upon the record, which is revisable here. Exceptions to the report, if founded on matter intrinsic, might have raised a question of law, which, if the court below decided erroneously, could have been revised and corrected in this court. If the matter were extrinsic, not appearing on the face of the report, it must have been shown to the court below by proper evidence. *Fuller v. Wright*, 10 Vt. 512. The County Court exercises a discretionary, unrevisable power, where the case shows the referee had some evidence properly before him to sustain his finding, as the parties, by agreeing to refer the case to him, make him the trier of the facts and leave it to him to determine the weight that should be given to the testimony. The judgment of the County Court on the exceptions is therefore affirmed.

At the March Term, 1887, of this court, held in said county, the plaintiff filed his petition for a new trial, which petition was continued into the present term. It is preferred on two grounds: first, that the report is against the evidence adduced at the trial; and second, that since the trial new evidence has been discovered, which would establish the fact that one pile

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of wood sold to the defendant contained 64 cords instead of 58 cords, as found by the referees.

The rule relative to new trials has been clearly defined. When there is any conflict of evidence and any reasonable ground for doubt on the evidence which way the fact is, the finding of the trier of the fact is conclusive. "If the verdict can be supported upon any rational view of the evidence, it should stand; and it never has been considered a sufficient ground for a new trial that the verdict is merely against a preponderance of the testimony, or that the court from a consideration and examination of the testimony might have arrived at a different result." *Weeks v. Barron*, 38 Vt. 420; *Hill v. New Haven*, 37 Vt. 501; *Westmore v. Sheffield*, 56 Vt. 239.

Having carefully examined the testimony filed in support of this petition, we are unable to find that there was no evidence to support the finding of the referees. The question was litigated before them whether or not Luke Tarbell sold and delivered the 419 cords of wood with the plaintiff's consent. The testimony of Luke tended to prove the affirmative of this issue. The testimony of Daniel tended to show that at a conversation in the mill-yard between himself, Luke and the plaintiff, it was agreed that he should sell the wood to the defendant, as he had a contract with the defendant and could do better with the wood than they could; that a bill (Exhibit C) was afterwards handed to the plaintiff which apprised him of the fact that the wood had thus been sold by Daniel, who was to repay him for it in wood, and that the plaintiff made no objection thereto. We are unable to say that the finding of the referees on this question was so clearly against the weight of evidence as to warrant a new trial on that ground.

The newly discovered evidence is merely cumulative and is not of such a character as would be likely to make any substantial change in the result if a new trial were ordered; besides, no sufficient reason is assigned for its not having been adduced at the trial before the referees. The petition therefore must be dismissed with costs.

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Town of Topsham v. Town of Chelsea.

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## TOWN OF TOPSHAM v. TOWN OF CHELSEA.

*Insane Pauper.*

1. When a child's intellect has been so impaired by insanity that she is incapable of exercising any choice or intention in regard to her residence, she would not be emancipated on attaining her majority if she continued to reside in her father's family, and would take by derivation a settlement acquired subsequently by him.
2. Until the contrary is conclusively shown, it is presumed that a pauper has sufficient intellect and intelligence to exercise a choice and intention in regard to her residence.
3. Where an insane child, after she has attained her majority, continues to reside in her father's family, and he subsequently acquires a settlement in another town, it is unnecessary to decide whether she was emancipated; for if she did not take the settlement of her father, she took one in her own right by a residence of more than seven years.

ORDER of removal of a pauper. Heard on an agreed statement of facts, June Term, Orange County Court, 1886, ROWELL, J., presiding. Judgment that the pauper was duly removed from the town of Topsham to the town of Chelsea.

*Agreed statement :*

"It is admitted by the parties in this cause that the facts are sufficient on which to base a judgment for the plaintiff, in the usual form, unless the contrary hereinafter appears.

"The pauper became eighteen years of age at a time when her father lived and had his legal settlement in the town of Corinth, Vt. About that time her father and family moved to Chelsea, the defendant town, and he there acquired a legal settlement and has ever since held the same.

"This settlement was acquired by seven years' residence, commencing in March, 1867. The pauper always resided with her father and in his family until a short time before the order

in this case was made, and has never gained a settlement anywhere for herself unless she has in said Chelsea. She resided and had her home in said Chelsea for more than seven years after she became of age, and has never resided in any other town for the space of seven years, and had her settlement in said Chelsea at the time said order was made, providing she was mentally and physically capable of gaining a settlement by residence, or if she took and had her father's settlement which he had at said time in said Chelsea.

"The pauper has always been mentally and physically infirm, and not capable of taking care of herself, and required and has had the care of her father in his family the same since she became eighteen years of age as she had before.

"The pauper at the time she became of age, and for a long time before, had been insane at irregular intervals, frequently recurring, and had so been insane to such an extent that she was incapable of taking care of herself, from the fact that it could not be anticipated from day to day what her condition would be. And her mind was so affected by her often recurring fits of insanity that she was rendered incapable of caring for herself even in her sane intervals. And this condition of mind has continued ever since."

*S. B. Hebard*, for the defendant.

At the time the pauper became of age her father, from whom she derived her settlement, had his settlement in Corinth, and therefore her settlement is in Corinth.

When she arrived at majority she was emancipated, and did not in her own right acquire a settlement elsewhere, and could not, because of her mental condition.

She could not "come to reside" in any other town, by reason of her infirmity of mind.

She could not have the necessary intent. To have acquired a settlement in Chelsea, she must have intended to reside there and this from her condition she did not and could not legally have done.

If her father had not resided in Chelsea the requisite seven years, so that he did not gain a settlement, but the pauper did reside there seven years, could she have acquired a settlement

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in her own right? Certainly she could not, as the necessary element of the coming to reside is lacking, namely, the intent.

But if the court shall hold that the pauper was never emancipated, then we say that she was not subject to an order of removal. To be subject to an order she must have "come to reside" in Topsham, in the legal sense. And legally she could not have so "come to reside," being *non compos mentis*.

*R. M. Harvey*, for the plaintiff.

The pauper's mental condition was not such as to render her incapable of gaining a settlement. It does not appear, except perhaps inferentially, but that her residence in Chelsea was of her own choice, that she was not capable of choosing, and was acting under restraint. This case comes under the rule laid down in *Ludlow v. Landgrove*, 42 Vt. 137. It is not inconsistent with *Brownington v. Charleston*, 32 Vt. 411. It is not very material whether the pauper was emancipated or not; for if not, then she takes the settlement of her father, which was in Chelsea. *Hardwick v. Pawlet*, 36 Vt. 320; *Upton v. Northbridge*, 15 Mass. 237; *Charleston v. Boston*, 13 Mass. 469; *Orford v. Rumney*, 3 N. H. 331; *Salisbury v. Orange*, 5 N. H. 348; *Alexandria v. Bethlehem*, 16 N. J. L. 1 Harr. 116; *Bradford v. Lunenburg*, 5 Vt. 481.

The law presumes that the pauper was emancipated on becoming eighteen years of age. *Hardwick v. Pawlet*, 36 Vt. 320; *Poultney v. Grover*, 28 Vt. 327.

The opinion of the court was delivered by

Ross, J. The contention is in regard to the last legal settlement of the pauper, Mary Folsom. When the pauper became of age her father's legal settlement was in the town of Corinth. Soon after that date, the father moved with his family, including the pauper, into the defendant town and there acquired a legal settlement. If the pauper took this last settlement of her father, or if she acquired a legal settlement in Chelsea in her own right by more than seven years' residence therein, unaided

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by the town, she was properly removed to the defendant town. The agreed facts do not very conclusively show whether the pauper possessed sufficient intellect and intelligence to exercise an intention and choice in regard to her place of residence. If she did, there being nothing in the agreed case to show that her residence in Chelsea was constrained, it is presumed to have been from choice and because she preferred to live there with her father, and she gained a legal settlement in Chelsea in her own right. But if the frequent fits of insanity, which began to occur before the pauper attained majority, had so impaired her intellect and intelligence, as it would seem quite probable it may have done, that she was incapable of exercising any choice or intention in regard to the place of her residence, then she was suffering from such mental and physical disability and infirmity as rendered it fit that she should remain with, and under the control, care and protection of her father; and she would not be emancipated on attaining majority, and would take the after-acquired settlement of her father in Chelsea. *Hardwick v. Pawlet*, 36 Vt. 320. Such a mental and physical condition would rebut the presumption of emancipation which arose from the attainment of majority. Whether emancipated or not, she resided continuously in the family of her father in Chelsea. Hence she either acquired a legal settlement there in her own right, or took the legal settlement acquired by her father. It is not material to determine which; for it is agreed in the agreed statement of facts that the facts are sufficient to uphold a judgment for the plaintiff in the usual form, unless the contrary appears. The defendant contends, that if the pauper's intellectual and physical condition was such that she could exercise no choice, or intention in regard to the place in which she would reside, she was a transient pauper in the plaintiff town, and not amenable to an order of removal, because she did not, in the language of the statute, "come to reside" in the plaintiff town; that is, reside there from choice and intention. To be amenable to an order of removal, the pauper's residence in the removing town must

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be from choice and intention. But, by the agreed case, the parties have supplied this fact, if necessary to support the order of removal. It is evident from the statement of the doctrine in *Hardwick v. Pawlet*, *supra*, that a child may be in such a condition as to render it fit, on the ground of humanity, that it should remain under the care, control and protection of the parent, after attaining majority just as it did before that time, and yet have the power of choosing in regard to a place of residence. If therefore the decision should be placed upon the basis that the pauper took her father's settlement in Chelsea, acquired after she attained majority, because unemancipated, the parties, in the agreed case, have supplied the other fact, the ability to chose and intend, necessary to uphold the order of removal. It is, therefore, not necessary to determine whether the pauper was to be regarded emancipated or unemancipated, during her residence in her father's family in Chelsea. In whichever condition, on the agreed facts, the plaintiff is entitled to hold the judgment of the County Court in its favor.

That judgment is affirmed.

*In re* HIRAM BELLOW'S ESTATE. EDWARD A.  
SOWLES, APPELLANT.

*Executors and Administrators.* R. L. ss. 2065-67, 2270.

Under the statute,—R. L. s. 2065,—an executor has the right of appeal from an order of the Probate Court removing him and appointing an administrator in his place.

APPEAL from the Probate Court ordering the removal of the defendant as executor of the will and estate of Hiram Bellows, deceased, and the appointment of S. S. Allen as administrator of said estate. Heard by the Court, April Term, 1886, Franklin County, ROYCE, Ch. J., presiding. Judgment that the appeal be dismissed. The case appears in the opinion.

*E. A. Sowles, pro se.*

The statute allowing appeals applies to this case. R. L. ss. 2270-5-9. The legality of the order is brought in question, and this clearly entitles the defendant to an appeal. *Holmes v. Holmes*, 26 Vt. 536; *Hilliard v. McDaniels*, 48 Vt. 124; *Adams v. Adams*, 21 Vt. 162.

Our courts have sustained appeals from the appointment of administrator under various circumstances, and no suggestions are found that the right of appeal depends upon any circumstances. *Hilliard v. McDaniels*, 48 Vt. 124; *Woodward v. Spear*, 10 Vt. 420; *Fletcher's Case*, 29 Vt. 98; *Anderson's Case*, 42 Vt. 350; *Lawrence v. Inglesby*, 24 Vt. 42; *Willey v. Brainerd*, 11 Vt. 107.

The case of *Felton v. Sowles*, 57 Vt., does not apply to this case. This was not a final order.



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In re Bellows' Estate.

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Sec. 2627 of Rev. Laws was not enacted at the time of the testator's death. At common law no bond from an executor was required. *Ames v. Armstrong*, 106 Mass. 15; *Wms. Ex.* p. 527; *Adams v. Adams*, 21 Vt. 162; *Bellows v. Sowles*, 57 Vt. 164; *Weeks v. Sowles*, 58 Vt. 696.

*Cross & Start*, for the plaintiffs.

On refusal of the appellant to furnish the bail required by the order of the Probate Court, the judgment of said court now appealed from is expressly authorized by the Rev. Laws, s. 2074. The power of removal conferred by this statute for neglect and refusal to comply with the orders of the court is intended as a summary method of deposing an impeccunious and defiant executor, administrator or trustee, and thereby save the estate from being squandered and diverted.

The decree appealed from is the natural and inevitable result of non-compliance with the order to file a bond as executor of Hiram Bellows' estate, and if that order is not the subject of appeal this cannot be.

It has already been decided by this court that the order requiring the executor to file a bond in this case, was one from which no appeal would lie. *Felton v. Sowles*, 57 Vt. 382.

The reasoning of the court in that case applies with equal force to the order under review here.

In *Leach v. Leach*, 51 Vt. 440, this court held that an order, in its terms broad enough to provide for the maintenance of a widow and her minor children during the settlement of the estate, is within the discretion of the Probate Court and conclusive, and no appeal lies from such decree.

The record shows no interest of the defendant in the estate that would allow him an appeal. *Hemmenway v. Corey*, 16 Vt. 225.

The opinion of the court was delivered by

TAFT, J. The appellant was executor of the estate of

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In re Bellows' Estate.

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Hiram Bellows. Under the last clauses of sec. 2067 R. L., he was ordered by the Probate Court to file a bond as executor, and upon his neglect to do so, and for that reason, the court removed him and appointed an administrator, *c. t. a.* From the order of removal and appointment the said Sowles appealed. The appellees, being legatees under the will, moved, in the County Court, to dismiss the appeal for two reasons, viz. : First, that the decree and order of the Probate Court was not one from which an appeal would lie ; second, that Sowles had no such interest in the estate as entitled him to an appeal. The County Court dismissed the appeal and the appellant excepted. This brings the two questions before us for revision. Sec. 2074, R. L., expressly authorizes the Probate Court to remove an executor who neglects to perform an order of the court. The authority of the court so to do is not here questioned. Sec. 2270, R. L., provides that " a person interested in an order, sentence, decree or denial of a Probate Court, who considers himself injured thereby may \* \* \* appeal." This case was once before the court (see 57 Vt. 382), and it was then held that no appeal would lie from the order of the court requiring an executor to file a bond under the last clause of sec. 2067, R. L. ; and the appellees contend, with much force, that where an executor is removed for neglect to comply with an order from which he could not appeal he is consequently denied an appeal from the removal itself. We do not think this necessarily follows. We think that if the statute gives the right of an appeal in any instance, it does in all, whatever the reason for the exercise of the right may be. The statute, as made, is general, and gives to any party interested an appeal from any order, etc., which is the subject of an appeal by any one. Our legislation and the decisions of our courts support the view here taken. Sec. 2081, R. L., prohibits an appeal from the appointment of a special administrator, the necessity of which section is not apparent, unless without it a proper party would be entitled to one. Sec. 2065, R. L., clearly recognizes the right of appeal by providing that

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In re Bellows' Estate.

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“ upon appeal from an order appointing an administrator the County Court shall, if such appeal is sustained, fill the vacancy thereby caused by immediate appointment of a suitable person as administrator, and the judgment and appointment shall be certified to the Probate Court, and such court shall, when such administrator files the bond required of administrators, grant letters of administration to him as though he had been appointed by such court.” Whether the evil of leaving an incompetent and unfaithful deposed executor in control of the estate, as suggested by the brief of the appellees, would follow as the result of an appeal, we are not called upon to decide, as the question is not before us. Upon a similar question in case of a guardian (*State v. McKown*, 21 Vt. 503), it was held that an appeal did not vacate the order of removal, but suspended the rights of the removed guardian until restored by a decision of the appeal in his favor. And see *Small v. Haskins*, 26 Vt. 209. But with this question we have nothing to do. And see cases of appeal from the appointment and removal of administrators. *Re Holmes Estate*, 26 Vt. 536; *Re Anderson's Estate*, 42 Vt. 350; *Hilliard v. McDaniels*, 48 Vt. 122. We hold that the order was one from which a proper party might have taken an appeal.

Had the executor, Sowles, the right to an appeal? The executor of a will is the creation of the testator. The Probate Court has no power of appointment, the testator alone has this right. The dominion of the property after the testator's death is given the executor. *Sabine v. Rounds*, 50 Vt. 74. We think the executor has such a right to the property of the estate, conferred upon him by the will, as gives him the right of an appeal. He has, unless unfit, the legal right to administer the estate. What the rule may be in case of an administrator simply, or one *c. t. a.*, we are not called upon to decide.

There was error in dismissing the appeal.

Judgment reversed and cause remanded.

POWERS, J., did not sit, being absent.

## STATE v. VAN NESS SPAULDING.

*Criminal Law.* R. L. s. 1653.

1. CHALLENGE. A respondent's right under the statute,—R. L. s. 1653,—to challenge peremptorily continues until the juror is sworn,—even if he had accepted the juror.
2. EVIDENCE. EXAMINED COPY. In a prosecution for the illegal sale of liquor, a copy of the assessment rolls kept in the office of the collector of internal revenue, showing that the respondent had a U. S. license for the sale of liquor, is admissible to prove that he did sell, although the copy was made by one who was not connected with the office, but who testified that he made it after examination of the records.
3. PRACTICE. SECOND OFFENSE. The respondent was indicted for the illegal sale of liquor and a prior conviction for a like offense was charged; the jury merely found that he was guilty of one offense; and the sentence was respited in the court below, and his exceptions sustained; *Held*, that there was no question in respect to the sentence before the court.

INDICTMENT charging the respondent with the illegal sale of intoxicating liquor. Trial by jury, September Term, 1885, Orleans County, Ross, J., presiding. Verdict, guilty of one offense.

It was charged in the indictment that the respondent was guilty of a second offense, but no evidence was introduced tending to prove a prior conviction.

*L. H. Thompson*, for the respondent.

1. It was error to admit Norton's testimony and the copy which he claimed to have made from the book of the internal revenue collector. It was wholly hearsay. It was incumbent upon the State to show affirmatively that the testimony comes within some established rule. *Hadley v. Hove*,

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 State v. Spaulding.
 

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46 Vt. 142; *Miller v. Wood*, 44 Vt. 378. The book was not in the nature of a public record so that its contents could be proved by an examined copy. 1 Best Ev. (Wood's ed.) p. 389; 1 Greenl. Ev. (12th ed.) ss. 91, 485. If the court could take judicial notice that there was an U. S. statute (which is denied) which required the book in question to be kept in such manner as to give it the character of a public record, it could not take judicial notice that the book was that required to be kept, or kept by the person who should have kept it. 1 Phil. Ev. (C., H. & E. Notes) 351; *Reg. v. Langton*, 13 Cox C. C. 345; s. c. Eng. Rep. 369; *Delano v. Blanchard*, 52 Vt. 585. In 1st Greenleaf on Evidence, s. 91, it is said: "Thus the contents of any record of a judicial court and of entries in any other *public books or registers* may be proved by an examined copy. This exception extends to all records and entries of a public nature, in *books required by law to be kept*."

Being private books or entries, they were not admissible, and certainly a copy would not be.

In *Doe v. Turford*, 3 B. & Ad. 895, 23 E. C. L. 390, the court held that to be admissible, the entry must not only have been made by the deceased person in the ordinary course of his business and duty, but said, PARK, J., "It is essential to prove that it was made at the time it purports to bear date; it must be a cotemporaneous entry." *Champneys v. Peck*, 1 Stark. 404; 2 E. C. L. 157.

In *Reg. v. Worth*, 4 Ad. & El. N. S. 136, (45 E. C. L. 136) it was held that to be admissible such entry must have been made in the *discharge of some duty for which the person making the entry is responsible*.

In *State v. Phair*, 48 Vt. 378, the entries made by Bailey, the deceased partner of Bailey & Parmenter, were admitted in evidence solely on the ground that they were made by him in the regular course of his business, and it was *his business* to make them and he had died since making them.

In the case of *Smith v. Blakley*, 2 L. R. Q. B. 326, decided

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in 1867, this question was fully discussed and the authorities carefully examined. In delivering the opinion of the court, BLACKBURN, J., said: "I think all the cases show that it is an essential fact to render such an entry admissible, that not only it should have been made in the due discharge of the business about which the person is employed, but the duty must be *to do the very thing to which the entry relates, and then to make a report or record of it.*" To the same effect are the opinions of MELLOR and LUSH, JJ., in the same case. 2 Greenl. Ev. s. 501.

The case of *State v. Hopkins*, 56 Vt. 257, is full authority in support of the point that neither the original entries in the books, or a copy thereof, were admissible in evidence.

2. The court erred in refusing to the respondent the right to peremptorily challenge the juror. His peremptory challenges were not exhausted. The jury had not been sworn. Bouvier. L. Dic. (Challenges) 7; 1 Bish. Cr. Proc. (3d ed.) s. 945; Bac. Abr. (Bouvier's ed.) 364; *State v. Fuller*, 39 Vt. 74; *Scripps v. Reilly*, 38 Mich. 10, 13; *Hunter v. Parsons*, 22 Mich. 96, 101; *Taylor v. Western R. R. Co.* 45 Cal. 329; *United States v. Daubner*, 17 Fed. Rep. 792; *People v. Carrier*, 46 Mich. 442; *Munley v. State*, 7 Blackf. 593; *Morris v. State*, 7 Blackf. 607; *Wyatt v. Noble*, 8 Blackf. 507; *Jackson v. Pittsford*, 8 Blackf. 194; *State v. Prichard*, 15 Nev. 80; *Spinger v. State*, 62 Ala. 387; *Roundo v. State*, 57 Wis. 50; *Hooker v. State*, 4 Ohio 350.

*F. W. Baldwin* and *W. W. Miles*, for the respondent.

The right of a party when put upon trial for crime, to challenge peremptorily a certain number of the jurors who are being impanelled to try him is a personal, and a common-law right; and the various statutes upon the subject are declaratory of the right; limiting the extent of it, but not varying the mode of it. Our statute, s. 1653, R. L., gives the right to every person who is arraigned and put on trial in the County Court, in a criminal prosecution, to peremptorily challenge six jurors;

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and the Supreme Court of the State has held that the respondent should be allowed to use his peremptory challenges as he should find occasion in making up the panel by which he was to be tried. *State v. Fuller*, 39 Vt. 74; *State v. Stoughton*, 51 Vt. 362. The right to peremptorily challenge a juror remains open until the jury are sworn. 1 Chit. Cr. Law, 436; 1 Bish. Cr. Proc. 945; *People v. Rodriguez*, 10 Cal. 50; *Moore v. Commonwealth*, 7 Bush, 191; *People v. Bodine*, 1 Denio, 281.

*F. E. Alfred*, State's Attorney, for the State.

The court properly ruled that the respondent had accepted said juror, and was not then entitled to exercise his right of peremptory challenge.

In *Regina v. Frost*, 9 C. & P. 129, 136, which was an indictment for high treason, the rule was stated by TINDAL, Ch. J., to be "that challenges must be made as jurors come to the book, and before they are sworn. The moment the oath is begun it is too late, and the oath is begun by the juror taking the book, having been directed by the officer of the court to do so."

To the same effect is *Regina v. Key*, 3 C. & K. 371; s. c. 2 Den. C. C. 351; 15 Jurist, 1065; *Regina v. Kerr*, Q. B. (Quebec) 3 Legal News. 299, Sept. 18, 1880; 1 Cr. Law Mag. 825.

"The more general opinion is," says Wharton, "that the prisoner's right to a peremptory challenge is waived when the juror is passed over to the court or prosecution, though this has been doubted by a court of great respectability. It is clear that the right ceases when the panel is complete and accepted." 3 Wharton's Am. Cr. Law, s. 2972; *State v. Cameron*, 2 Chand. (Wis.) 172, 178; *Horbach v. The State*, 43 Tex. 242, 260; *Drake v. The State*, 5 Tex. Ct. of Appeals, 649, 655; *Patten's Adm'rs v. Ash*, 7 Searg. & R. 116, 122.

In *Lyman v. The State*, 45 Ala. 72 the court say: "Most

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clearly the right of challenge may be waived; and when it is waived by the State, and the juror is put upon the acceptance of the accused, and he is accepted by him as one of the triers, the process of his election is complete." *Spinger v. The State*, 62 Ala. 387, 388; *Tatum v. Preston*, 53 Miss. 654; *Thompson v. The State*, 58 Miss. 62; *State v. Durr*, *Supt. Ct. of La.* 2 South. Rep. 546; *Commonwealth v. Rogers*, 7 Met. 500; *Commonwealth v. Webster*, 5 Cush. 295; *Commonwealth v. McElhaney*, 111 Mass. 439; *State v. Pike*, 49 N. H. 399. The evidence introduced by the State with reference to the assessment rolls of the internal revenue collector at Montpelier, and Norton's testimony concerning the same, were admissible when taken in connection with the testimony of the respondent, as tending to show that he had taken out a United States license as a retail liquor dealer, and intended to pursue that avocation.

Under the Revised Statutes of the United States, Ed. of 1878, ss. 3143, 3145, 3146, and 3163, it is apparent that it is the duty of each collector of internal revenue to keep full and accurate books of account of all official transactions had with him while in the performance of the duties of his office.

Records of the character of these have frequently been used, and have always been regarded as admissible evidence of the facts recited without any further authentication, for the reason, as well stated in s. 219 of Best on Evidence, "Of the public nature of the facts themselves, such documents are entitled to an extraordinary degree of confidence." 1 Greenl. Ev. s. 483; *Evanston v. Gunn*, 9 Otto, 660; *State v. Intox. Liquor*, 44 Vt. 208; Best Ev. s. 485; *Coolidge v. Ins. Co.* 14 Johns. 308; *Dyer v. Snow*, 47 Me. 254; *Whitehouse v. Bickford*, 29 N. H. 471; *State v. Lynde*, 77 Me. 561; s. c. Atl. Rep. 687; *Spaulding v. Vincent*, 24 Vt. 501; *James v. Hodsdon*, 47 Vt. 127.

The opinion of the court was delivered by

TAFT, J. I. Did the court err in ruling that the



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respondent had lost his right to peremptorily challenge the juror, Hitchcock, by having once accepted him? The panel had not been sworn, the jurors had been separately examined and the respondent had said he had no objection, or no further inquiry. Whether that amounted to an acceptance of the jurors, may be questionable; but even if it did, we think the right to peremptorily challenge jurors given by R. L. s. 1653, continues until the jurors are sworn. At common law each juror was separately called and when accepted was sworn, and this was continued one by one, until the panel was full; and such is the practice in some of the American States; but in this State, it has been otherwise, no doubt to avoid the needless repetition of the oath. We hold that the right to challenge peremptorily continues until the juror is sworn, and this is the only question in respect to the jury before us.

II. The court permitted the prosecution to give in evidence a copy of the assessment rolls kept in the office of the collector of internal revenue in this district in connection with the testimony of the witness Norton. The latter was not in any manner connected with the office, but he testified that he had examined the assessment rolls and records in the office and made said copy. We think no question could successfully be made but that it would be proper to show that the respondent had obtained an United States license for the sale of liquor. It has been held pertinent evidence upon the question of intent to sell, and we think it equally admissible upon the question of whether the respondent did sell; for if he had the intent to do an act, it would be more probable that he did it than it would be if he had no such intent. In *State v. Intoxicating Liquors*, 44 Vt. 208, it was held that the original assessment rolls and records in the assessor's and collector's office were competent evidence to prove the fact of payment for a liquor license. We think this case full authority for holding that the records in the collector's office were competent evidence; and that they were clearly within that class of *public books or official registers*, which may be proved by an examined or sworn copy.

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1 Greenleaf on Evidence, s. 483-5; 1 Best on Evidence, s. 487; *Spaulding v. Vincent*, 24 Vt. 501; *State v. Intoxicating Liquors*, *supra*; *Evanston v. Gunn*, 99 U. S. 660. It was also admissible upon the question of who was conducting the business.

III. Sentence was respited in the court below. No finding was made either by the court or jury as to whether the respondent was guilty of a second offense or not. There is no question, therefore, in respect to the sentence before us.

Exceptions sustained, judgment reversed, verdict set aside, and cause remanded.

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Hubbard v. Manwell.

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JESSE M. HUBBARD AND WIFE v. PHILIP V.  
MANWELL.

*Water Course and Water Rights. Riparian Owners.  
Alluvion, Division of.*

When alluvion is formed on lands bordering on an unnavigable river, owned by continuous proprietors, the rule for distribution of the accretions is to extend the side lines of each owner to the nearest river bank, giving to each the the alluvial deposits in front of his own land, especially if equitable.

TRESPASS on the freehold. Heard by the court on a referee's report, Chittenden County Court, September Term, 1886, TAFT, J., presiding. Judgment *pro forma* for the plaintiffs. Exceptions by defendant.

The referee found as follows :

“ At the time of the commencement of this suit, and at the time of her death, which has since occurred, Aurissa W. Hubbard, one of the plaintiffs, and the wife of Jesse M. Hubbard, the other plaintiff, was the owner in fee of a piece of land on the southerly side of the Winooski (formerly Onion) River, in Burlington, of the width of about 27 rods; and had been such owner ever since October 3, 1874, having acquired her title thereto under a deed from one Lyman and his wife to one Ballou, dated July 12, 1836, and through various intermediate conveyances, one of which was from Myron and Seth Morse to the plaintiff, Jesse M., dated June 16, 1859, since which date said Jesse M. has been in continuous occupation thereof. But it did not appear that after his wife became the owner of the land, he had or claimed any right or title to it except such as resulted from his marital relation. The description of the premises in said deed from Lyman and wife to Ballou was as

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follows: 'Beginning at a stake standing on the bank of Onion (now Winooski) River, being the northeasterly or up-river corner of that part of said lot No. 30, which was heretofore owned by David Russell and Stephen Russell; thence south \* \* \* ; thence north 59 deg. 30 min.; east 26 chains, to the bank of Onion River; thence down said river, by the bank thereof, to the place of beginning, containing 14 69-100 acres.'

"The defendant, at the time of the committing of the alleged trespasses, was the owner in fee of a farm, of the width of about 90 rods, adjoining said land of Mrs. Hubbard, and lying next below it on said river, and had been such owner since November, 1868, having derived his title by deed from one Fletcher, who acquired his title by the foreclosure of a mortgage executed to him by one Adams on the 28th day of November, 1849, in which mortgage the defendant's farm is described as follows: 'Being the whole of 100 acre lot No. 198, the half of lot No. 197, the south part of lot No. 21, and and the north part of lot No. 30, and bounded on the north by land owned by J. B. Bixby and land lately owned by C. P. Van Ness, on the east by Onion River 3 \* \* \*.'

"For many years previous to the committing of the alleged trespasses, the bank of the river along the entire river front of Mrs. Hubbard's land, about 50 rods in length originally, and extending down stream a distance of nearly 50 rods along the defendant's original river front, had gradually and imperceptibly receded towards the north by deposits and accretions made thereon by the stream, until, at the time of the alleged trespasses (extending the side or land lines of Mrs. Hubbard's said land straight to the new river bank), the alluvion so formed in front of her said land amounted to about five acres, and that so formed on the defendant's land amounted to about eight and one half acres, a portion of which alluvion, opposite the land of each party, was covered with trees of various sizes; and during the same period the defendant's entire river bank, about 100 rods in length below said alluvial deposit, was gradually worn off and carried away by the stream, causing a loss to him of about seven acres of his land situated on that portion of the bank.

"Before the referee the plaintiffs claimed that the alluvion so formed on the old bank of said stream should be divided between the parties by a line called 'division by shortest dis-

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tance,' drawn from the point of intersection of Mrs. Hubbard's westerly line with the old bank of the river, as described in said deed from Lyman and wife to Ballou, marked 'C' on the map hereinafter referred to, northwesterly to the nearest point on the present river bank perpendicularly to the thread of the stream, making an acute angle with said westerly line, as defined in said deed; or, if that line of division should not be considered the true and correct one, then said alluvion should be divided between the parties by a line called 'division by chord perpendiculars,' according to the rule laid down in *Emerson v. Taylor*, 9 Me. 44, extending from said point of intersection, nearly north, to the present river bank, striking the same at a point about 19 3-4ths rods up stream, or easterly from where said line, called 'division by shortest distance,' strikes the present bank; or, if neither of said two lines of division should be adopted, then a line called 'division by proportional of old and new shore,' according to the rule adopted in *Deerfield v. Arms*, 17 Pick. 41, dividing said accretion between the parties in proportion to the extent of their respective lines on the old river bank, should be adopted; which last mentioned line would extend from the same point 'C' as the other two, and strike the new river bank about six and one-fourth inches farther up stream than said line of chord perpendiculars.

"The defendant claimed that the true line of division of said alluvion was a line corresponding with the westerly line of Mrs. Hubbard's land, as described in Lyman and wife's deed to Ballou, extended to the new river bank.

"In making this division of the accretion, as claimed by the plaintiffs, both by chord perpendiculars and by proportional of old and new shore, that portion of the shore line, and only that portion which bounds the entire accretion, not only against plaintiffs' and defendant's land, but also against the land of Reynolds, the proprietor next above, was considered.

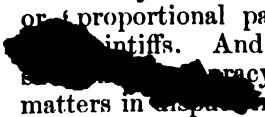
"From the year 1859, when Jesse M. purchased his lot, to the winter of 1881, the said Jesse, without the knowledge of the proprietors of the defendant's lot, from time to time, as he had use for the same, cut fence poles, stakes, and some wood for his own use on this alluvial tract, mostly above the line of division contended for by the defendant, but in some years below that line, upon the territory in dispute. He also picked

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up some flood-wood on that territory, made temporary fences on the disputed tract, and in the winter of 1881-82 felled several large trees below the line, as claimed by the defendant, which defendant afterwards appropriated. The defendant, also, from time to time, has cut poles for fencing on this disputed tract.

"During the winter of 1881-82 the defendant cleared two and twelve one-hundredths acres of the alluvial land in dispute, cutting and drawing away 110 cords of wood, of the value of \$75, all of which wood was cut upon land lying between the line, as claimed by the defendant, and the 'line of shortest distance,' as claimed by plaintiffs, and two-thirds of which, in both value and amount, was cut between the line, as claimed by defendant, and the 'line of chord perpendiculars' or 'proportional parts of old and new shore,' as claimed by plaintiffs. And I attach hereto a diagram showing, with  the whole locality connected with the matters in dispute in this case.

"The irregular lines designated on the map as 'the old river bank,' marks the bank of the river as it was in 1836; and the original corner between the plaintiffs' and the defendant's premises, described in the deed as the up-river corner of the Russell lot, is a point on the old river bank marked 'C' upon said map."

The deed from Lyman and wife to Ballou contained the following clause in addition to the description given in the referee's report: "Meaning and intending hereby to convey the same land which was conveyed by Moses Catlin to Amasa Paine by deed bearing date January 29, A. D. 1806."

Deed of Catlin to Paine: "Beginning at a stake standing on the south bank of Onion River \* \* \*; thence running south 58 degrees W. 24 ch. 66 li. \* \* \*; thence N. 58 degrees E. in the easterly line of land occupied by David Russell and Stephen Russell, as aforesaid, to the aforesaid south bank of Onion River, thence up said river to the first-mentioned bounds."

Deed of Ballou to Bishop, October 28, 1836: "Part of lot No. 30 of the 103 acre lots, beginning at a stake standing on the bank of Onion River, being the northerly or up-river corner, etc.," the rest of the description being the same as that in the deed of Lyman and wife to Ballou.

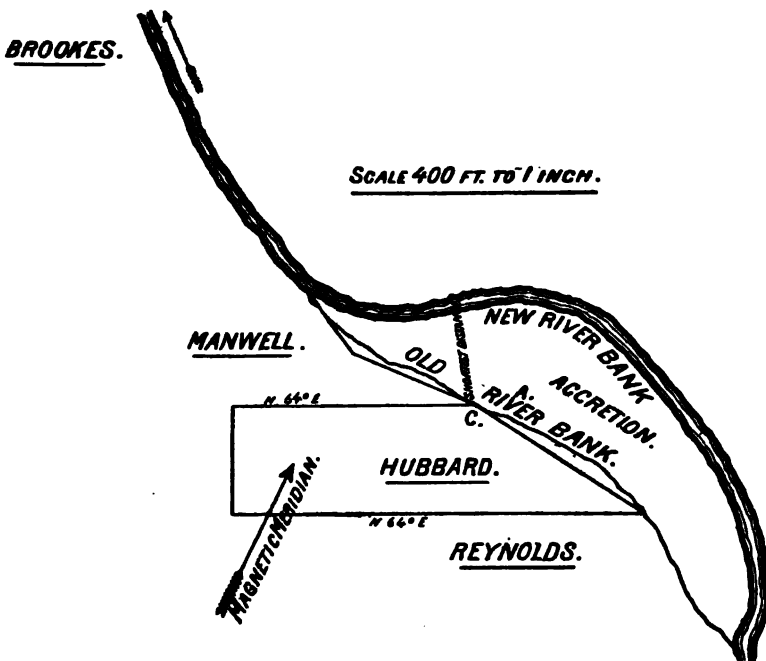
"Meaning and intending hereby to convey the land which

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was conveyed by Moses Catlin to Amasa Paine, by deed bearing date January 29, A. D. 1806, and the same that was conveyed by deed to me by Lewis and Mary B. Lyman on the 12th day of July, A. D. 1836."

Deed of Bishop to Brown, June 2, 1838: "Part of lot No. 30 of the hundred acre lots, beginning at a stake standing on the bank of Onion River, being the northerly or upper corner of that part of said lot which was heretofore owned and occupied by David Russell; thence S. 59 deg. 30 min. W., etc. \* \* \* ; thence N. 59 deg. 30 min. E. 26 chains to the bank of Onion River; thence down said river to the place of beginning, containing 14 69-100ths of an acre of land, be the same more or less."

The descriptions in the other deeds from Brown to Peck, from Peck to Morse, from Morse to Hubbard, consisted of the most part of references to former deeds.



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*Hard & Cushman*, for the defendant.

I. The death of Mrs. Hubbard abated the suit. 1 Chit. Pl. (16th Am. ed.) 85; Schoul. Husb. & Wife, ss. 167, 424; *Pettingill v. Butterfield*, 45 N. H. 195; *Fuller v. H. R. R. Co.* 21 Conn. 557; *West v. Jordan*, 62 Me. 484.

II. As by the terms of the deed from Lyman and wife to Ballou, through which Mrs. Hubbard's title was derived, the river-side line of the line conveyed is defined as the *bank* of river, no subsequent accretions thereto would enure to the benefit of the owners of that land. Mrs. Hubbard, therefore, never had title to *any* of the alluvion mentioned in the referee's report. Gould on Wat. s. 200; 3 Wash. R. P. 354, *note*; 1 Wait. Act. & Def. 711, 716; *Child v. Starr*, 4 Hill, 369; 17 N. Y. C. L. 893; *Canal App. v. People*, 17 Wend. 596; S. C. Book 13, N. Y. C. L. 247; *Halsey v. McCormick*, 13 N. Y. 296; *Yates v. Van De Bogart*, 56 N. Y. 526, 531; *Hatch v. Dwight*, 17 Mass. 289, 299; *City of Boston v. Richardson*, 13 Allen, 146, 155; *Nickerson v. Crawford*, 16 Me. 245; *Bradford v. Cressy*, 44 Me. 9; *Stone v. Augusta*, 46 Me. 127; *Lincoln v. Wilder*, 29 Me. 169, 179; *Rix v. Johnson*, 5 N. H. 520; *Daniels v. Cheshire R. Co.* 20 N. H. 85; *Morrow v. Willard*, 30 Vt. 118.

Nor is the construction of that deed affected by the clause in it, beginning "Meaning and intending to convey the same land" conveyed by Catlin to Paine. *Hibbard v. Hurlbert*, 10 Vt. 173, 180; *Gilman v. Smith*, 12 Vt. 150; *Spiller v. Scribner*, 36 Vt. 245; *Keenan v. Cavanaugh*, 44 Vt. 268; *Howe v. Bass*, 2 Mass. 380; *Pernam v. Wead*, 6 Id. 131; *Melvin v. Proprietors, etc.* 5 Met. 16; *Dana v. Bank*, 10 Met. 250; *Preston's Heirs v. Bowmar*, 6 Wheat. 580; S. C. Bk. 5 (L. ed.), U. S. Sup. Ct. Rep. 386; 4 Kent, 466; 3 Wash. R. P. 350, 352; 1 Wait. Act. & Def. 714.

III. If Mrs. Hubbard had title to any of the alluvion, a division of it by an extension of the westerly line of her land, as described in said deed from Lyman and wife to Ballou, to



the new river bank, is as favorable a line to her as she was legally entitled to upon the facts reported.

No rule for the division of alluvial accretions between conterminous riparian proprietors has ever been authoritatively adopted in this State. The members of the court were not unanimously in favor of the decision in *Newton v. Eddy*, 23 Vt. 319. Judge REDFIELD was in favor of adopting a rule similar to that contended for by the defendant in this case. The soundness of *Newton v. Eddy* as an authority in support of any rule of division of alluvion has been questioned. *Batchelder v. Kiniston*, 51 N. H. 496.

It is not practicable to adopt any general and uniform rule which will not, in many cases, do absolute injustice to one party or the other. The Massachusetts courts, which seem to have had much to do with this question, concede the impracticability of devising a general rule. In *Deerfield v. Arms*, 17 Peck. 44, the court says: "This is a *curious*, and in any aspect in which it may be presented would be a *very difficult subject*, as well as the analogous one of the division of flats or lands bounding on salt water, over which the tide ebbs and flows, among conterminous proprietors, *were it necessary to prescribe a general rule applicable* to all supposable cases." And on page 45: "*Without attempting to establish a rule of general application*, we think that the one which shall most nearly, in general, accomplish these two conditions, will come nearest to doing *justice*." And the inconsistencies in their decisions, which will be apparent upon a perusal of all the cases, sufficiently prove, if proof were needed, that no rule of universal application is practicable. As an illustration of these inconsistencies compare *Deerfield v. Arms*, in which the rule applied was to give each proprietor as many portions of the new river bank as he owned in the old, or what, in the present case, is termed "division by proportional of old and new shore," with *Knight v. Wilder*, 2 Cush. 199, which was similar in its facts, and in which the line adopted was drawn

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at right angles with the river, or what, in the present case, is called "division by shortest distance."

In other cases, also, the language of the courts implies a consciousness of the difficulty of devising a uniform rule governing in all cases. Thus, in *Emerson v. Taylor*, 9 Me. 42.

In *Stockham v. Browning*, 18 N. J. Eq., the chancellor said that the rules were "very unsettled," etc. See *Elgin v. Beckwith*, 7 West. Rep. (s. c. 118 or 119 Ill.) 707; *Gray v. Deluce*, 5 Cush. 9; *Att'y-Gen. v. Boston Wharf Co.* 12 Gray, 553; *Thornton v. Grant*, 10 R. I. 477, 489; *Smith v. St. Louis*, 30 Mo. 290; *Chapman v. Hoskins*, 2 Md. Ch. 485; *Mayor of New Orleans v. United States*, 10 Pet. 117 (Bk. 9 L. ed. 594).

In *Deerfield v. Arms*, *supra*, SHAW, Ch. J., says: "There can be nothing clearer, as a principal of justice, than that the riparian owner is entitled to the alluvial deposits formed against his own land by imperceptible degrees."

*Wales & Wales*, for the plaintiffs.

I. If it were material to the plaintiffs' case it might fairly be contended that the legal effect of the successive grants under which they make title is to bound their lot upon the river so as to include the bed of the stream to its middle thread. 2 Wash. Real. Prop. 632; Ang. Wat. s. 23; *Watson v. Peters*, 26 Mich. 508; *Gavit v. Chambers*, 3 Ohio, 496; *Ex parte Jennings* (Judge COWEN's note), 6 Cowen, 518; *Lamb v. Rickets*, 11 Ohio, 311.

It is insisted that a fair construction of the grants in the chain of the plaintiffs' title, and the deeds are by express reference all tied together, does not indicate an intention on the part of any of the plaintiffs' grantors to exclude the river bed from his conveyance. Ang. Wat. ss. 24, 28, 30; *Luce v. Carley*, 24 Wend. 451; *Cold Spring Iron Works v. Tolland*, 9 Cush. 492.

It is true that in the second deed, and all but one of those

that follow the words, "by the bank thereof," are inserted, but all these deeds incorporate, by reference, the description of the first deed, except the conveyance from Bishop to Brown, which revives the language of the earliest deed, and describes the river boundary as running "down said river." It is insisted that the words "by the bank" are used synonymously with "down said river" or "up said river," and only signify that the river line is to follow the course of the stream, and is not straight, not that there is any purpose to reserve the *alveus* from the grant.

See Vice-Chancellor GRIDLEY's construction of the grants in *Varick v. Smith*, 9 Paige, 547; also *Sleeper v. Laconia*, 60 N. H. 201.

II. But except in its possible bearing upon the rule of the distribution of the alluvion the inquiry whether the plaintiffs' land extends to the middle of the stream is unimportant. The grants are all sufficient to carry title to low water mark. "It may be considered a canon in American jurisprudence," says Mr. Justice SWAYNE, "that when the calls in a conveyance of land are for two corners at, in, or on a stream or its bank, and there is an intermediate line extending from one such corner to the other, the stream is the boundary, unless there is something which excludes the operation of this rule by showing that the intention of the parties was otherwise." *St. Clair Co. v. Lovington*, 23 Wall. 46; *Starr v. Child*, 4 Hill, 369; *Lamb v. Rickets*, 11 Ohio, 311; *Jones v. Johnston*, 18 How. 150; *Halsey v. McCormick*, 13 N. Y. 296 (18 N. Y. 147).

But the conveyance of the bank to low water mark carries also the right to the alluvion.

It is the *ripa*, not the *alveus*, which is the foundation of riparian rights, and the ownership of the bank gives title to its growth in the nature of alluvion quite irrespective of any property in the bed of the stream. Ang. Wat. s. 53; *Lyon v. Fishmongers Co.* 17 Moak's Eng. Rep. 51; *Foster v. Wright*, 30 Moak's Eng. Rep. 648; *St. Clair Co. v. Lovington*, 23

Wall. 46; *Boorman v. Sunnuchs*, 42 Wis. 233; *Delaplaine v. C. & N. W. R. Co.* 42 Wis. 214.

So the alluvion would pass to the plaintiffs, the accumulated alluvion and all future increment of their bank, unless, as in some of the cases above cited, the calls of their deeds would cut off some portion of it. Such is not the case. In all the deeds subsequent to the first one, in which the description begins at the up-river corner of the Hubbard lot, the point of beginning is the up-river corner of the Russell or Manwell lot upon the upland, a point upon the old bank marked 'C' on the map. The third call is for a point on the bank of the river, the bank, that is, as it existed at the time of the successive grants, whence the boundary line proceeds either along the bank or in the thread of the stream to the point of beginning, the up-river corner of the Russell or Manwell lot. The legal effect of this term in the description is to carry the river line to the original corner projected to the thread of the stream, or to the bank at low water mark, in the direction in which the law would carry it in the distribution of the alluvion. The shore line or the mid-stream line is to be followed until it ceases to be applicable, which is at that point which is the true or legal corner of the Manwell lot. *Ipswich Petitioners*, etc. 13 Pick. 431; *Knight v. Wilder*, 2 Cush. 199 (at p. 210).

III. The final inquiry, therefore, is where is the legal up-river corner of the Russell or Manwell lot, which is the same with the question by what rule shall the alluvion be divided between these contiguous riparian owners.

If the plaintiffs' title goes to mid-stream, it is impossible to distinguish this case from the case of *Newton v. Eddy*, 23 Vt. 319; and the rule of that case should be adopted, which would divide the alluvion between the plaintiffs and the defendant by the line indicated on the map as drawn from the old corner on the up-land perpendicular to the stream.

The same rule is applied in the following cases: *Clark v. Campau*, 19 Mich. 325; *Aborn v. Smith*, 12 R. I. 371; *Porter v. Sullivan*, 7 Gray, 443.

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If the rule of *Newton v. Eddy* does not seem equitable, then the rule adopted in *Deerfield v. Arms*, 17 Pick. 41, which gives to each owner upon the bank as many equal parts of the new shore as he had feet upon the old, a rule adopted from the civil law, and which has been approved by the U. S. Supreme Court in *Jones v. Johnson*, *supra*, is certainly as favorable to the defendant as he can claim. The rule laid down in *Emerson v. Taylor*, 9 Me. 44, gives substantially the same division line as the Massachusetts rule. Ang. Wat. s. 55.

The opinion of the court was delivered by

ROYCE, Ch. J. This was an action of trespass, *quare clausum*, in which the plaintiffs claim to recover for an entry upon land claimed by the female plaintiff, and the taking and carrying away timber growing thereon. The case was referred and was heard upon the report made. The referee found that the parties were the owners of two tracts of land in Burlington, lying upon the bank of Winooski River. The plaintiffs' land is situate above the land of the defendant, and extends along the river for about fifty rods, and the defendant's for about ninety rods. Since the parties acquired title to the above tracts of land the entire river front of plaintiffs' and defendant's land had gradually and imperceptibly receded toward the north by deposits and accretions made thereon by the stream, until, at the time of the alleged trespass, extending the side line of the plaintiffs' land straight to the nearer river bank, the alluvion so formed in front of their land amounted to about five acres, and the alluvion so formed in front of the defendant's land amounted to about eight and a half acres. The trespass claimed to have been committed was upon the alluvion formed in front of the defendant's land.

The plaintiffs claim that their ownership of the alluvion is not confined to that formed in front of their land, but extends to and embraces a portion of that formed in front of the defendant's land, and that the alluvion should be divided between

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the parties by a line called "division by shortest distance," which is to be drawn from the point of intersection of Mrs. Hubbard's westerly line with the old bank of the river, as described in the deed referred to in report from Lyman and wife to Ballou, "northwesterly to the nearest point on the present river bank perpendicularly to the thread of the stream, making an acute angle with said westerly bank, as defined in said deed; or, if that line of division should not be considered the true and correct one, then said alluvion should be divided between the parties by a line called 'division by chord perpendiculars,' according to the rule laid down in *Emerson v. Taylor*, 9 Me. 44, extending from said point of intersection nearly north to the present river bank, striking the same at a point about nineteen and three fourths rods up stream, or easterly from where said line called "division by shortest distance," strikes the present river bank; or if neither of said lines of division should be adopted, then a line called 'division by proportional of old and new shore,' according to the rule adopted in *Deerfield v. Arms*, 17 Pick. 41, dividing said accretion between the parties in proportion to the extent of their respective lines on the old river bank, should be adopted."

The defendant claimed that the true line of division of said alluvion was a line corresponding with the westerly line of Mrs. Hubbard's land, as described in said deed from Lyman and wife to Ballou. In other words, that the accretions formed along the river bank of plaintiffs' land belonged to them, and those formed in front of his own land to him.

And such we understand the general rule to be in the case of non-navigable streams. 3 Kent Com. p. 428; Boone's Law of Real Property, s. 254.

Alluvion has been defined to be an addition to riparian land gradually and imperceptibly made by the water to which the land is contiguous, and to be an inherent and essential attribute to the original property; and is said to rest in the law of nature, and is analogous to the right of the owner of a

tree to its fruits and the owner of flocks and herds to their natural increase. *County of St. Clair v. Livingston*, 23 Wall. 46.

The owner takes the chances of injury and of benefit arising from the situation of his property. If there be a gradual loss, he must bear it; if a gradual gain, it is his.

All the cases cited in the briefs of counsel where a different rule from this natural and obvious one has been adopted, including those cases where either one of the rules contended for by the plaintiffs here has been applied, were either cases, where from their peculiar circumstances some such method of division seemed essential to a fair and just distribution between the riparian owners, or depended upon the fact that the lands in question bordered on a navigable stream and derived a great part of their actual value from that circumstance and from the benefit of the public easement. Per SHAW, Ch. J., in *Deerfield v. Arms*, *supra*.

The only case to which we have been referred where this court has been called upon to pass on a similar question was that of *Newton v. Eddy*, 23 Vt. 319, where the opinion was written by Judge REDFIELD, who dissented from the result arrived at by a majority of the court. It was decided upon its own peculiar circumstances and with the express recognition on the part of the court of the fact that its decision would not be likely to establish any general rule and with a confession from the dissenting judge that, for his part, he should have preferred the rule of the civil and common law.

All the authorities collected in defendant's brief agree in recognizing the fact that the law on this subject is very unsettled and in confessing the impossibility of establishing a uniform rule which shall be calculated to meet the infinitely varying circumstances of cases that may arise and to secure to the parties in every case a just and equitable distribution of alluvial lands. The object of all the cases, as defined by SHAW, Ch. J., in *Deerfield v. Arms*, is "to establish a rule of division among these proprietors which will do *justice to each*, where no

positive rule is prescribed and where we have no direct judicial decision to guide us."

With this consideration in view, and applying the principle announced at the outset in regard to the natural and inherent right of the owner of land, in the absence of any arbitrary rule on the subject and when consistent with the rightful claims of others, to its accretions and increments, as he correspondingly runs the risk of loss, to ascertain what portion of the alluvion belonged to the plaintiffs, the side lines of their land should be extended to the nearest river bank; and adopting that rule, it will be seen that no portion of the land, upon which the trespass is alleged to have been committed, belonged to the plaintiffs. And no injustice or unfairness is wrought by this method of division. The defendant has lost by attrition about seven acres situate on that portion of the river bank lying below said alluvial deposit. His total gain, therefore, is only about one and a half acres; while the plaintiffs have sustained no such loss to be offset against their gain. It can hardly be claimed that these circumstances are such as to require a resort to any arbitrary rule for the purpose of working out a fair and equitable distribution. The "peculiar circumstances" governing the decision in so many of the cases cited in favor of the parties claiming the benefit of some such rule, clearly, do not exist here, and for that reason alone those cases could not be relied upon as authorities in this.

Judgment reversed, TAFT, J., dissenting.



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Selinas v. State Agricultural Society.

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CHARLES W. SELINAS v. THE VERMONT STATE  
AGRICULTURAL SOCIETY AND ANOTHER.*Agricultural Society, Duty of in Respect to Persons Attending  
Exhibition. Negligence.*

1. It is the duty of an agricultural society to render the place, where it holds a public exhibition, reasonably safe to all persons lawfully in attendance.
2. It is a question of fact for the jury, whether an agricultural society is guilty of negligence in suffering during its exhibition a striking machine to be used on its grounds, with no guard around it, whereby the plaintiff was injured by a person, not an officer or a servant of the society, in the act of swinging a mallet to strike the machine, although the defendant had made a motion for a verdict on the plaintiff's testimony.
3. This is not a case of *ultra vires*, although the machine was not placed there by the defendants and its use was foreign to the purposes of their organization; and there was no evidence that they had any interest in it, or that it was there by their permission or knowledge; but it was for the jury to decide, if it were not assumed that the machine was there by license, whether it had been so long upon the grounds that the defendants ought, in the exercise of reasonable care, to have known of its presence, and also whether it was dangerous.
4. It was also for the jury to decide, whether the plaintiff's conduct was prudent or whether he was guilty of contributory negligence.

ACTION on the case for negligence. Trial by jury, September Term, 1886, Washington County, POWERS, J., presiding. Verdict and judgment for the plaintiff to recover \$725.

The plaintiff testified in part: That he attended the State Agricultural fair in September, 1884,—a joint exhibition by the State Agricultural Society and the Champlain Valley Association; that at the time of the accident he was looking for the superintendent to hire a piece of ground to sell whips on.

“I had business with another gentleman, looking after Mr.

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Hammond, and he and I proposed that we should look for Mr. Hammond and try our luck again. He was to take the same course we had taken before and I was to go through Floral Hall; after I parted with him, on my way to Floral Hall I was struck by a man and he broke my leg."

Q. State by what you were struck? A. I was struck by a mallet of some kind.

Q. Describe how you happened to be struck? A. I was going to Floral Hall looking for Mr. Hammond, as he was described to me. About every gentleman I saw, I was looking attentively to see if it was Mr. Hammond, and, walking slowly by, the first thing I knew I was knocked from my feet.

Q. How? A. By some one swinging a beetle. I did not see exactly how it was done. All I knew I was struck with the beetle and knocked on my back.

*Hard & Cushman and Heath & Willard*, for the defendants.

These defendants are two distinct corporations existing under separate legislative enactments, with limited and specially defined powers and functions.

It is sought in this action to charge the defendants for an injury to the plaintiff through the joint misconduct and negligence of the defendants in their corporate capacities.

Upon the case made before the jury by the plaintiff, the defendants insist that a verdict in their favor should have been directed. Even if the machine had been placed there by the defendants, and they had authorized its use in the ordinary way of using such a contrivance, this alone would not have been sufficient to render them responsible for injuries accidentally resulting from such use; for there was nothing in the kind or character of the machine which rendered it at all dangerous, nor was the use of it likely to produce injury to any one exercising ordinary care for his own safety. As well might the managers of the fair be held responsible for accidents resulting from the operation of machinery on exhibition.

There was no corporate action respecting the striking

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machine; no testimony was introduced tending to show any instructions to defendants' agents or servants to do anything in excess of their proper corporate power; none to show a ratification by defendants of any unwarranted acts or neglects of their agents; none to show that the defendants derived, or expected to derive, any benefit from the presence of the machine, nor that they in any manner recognized the machine or its use as any part of the exhibition.

To preclude the defendants from the right to insist upon the point of *ultra vires* in this case "it is necessary that it should appear that they have in a clear and explicit manner recognized the act as done in their business." Green, Bri. *Ultra Vires*, 364; Boone Corp. s. 84; *Hutchinson v. R. R. Co.* 6 Heisk. 634.

It is true, as a rule, that as the corporation is created for a particular purpose only, and endowed with powers to accomplish that purpose, nothing can be done by it, or in its name, that is not within the intent of its charter. It must indeed act through agents and officers; but if these undertake to do what the corporation is not empowered to do, their action can not impose a liability upon the corporation. Cooley, Torts, 119.

So far as the testimony shows, or tends to show, the man, whoever he was, who swung the beetle against the plaintiff's leg, was a mere uninvited intruder, prompted solely by his own curiosity and meddlesomeness.

To entitle the plaintiff to recover it must appear affirmatively that he was in the exercise of at least ordinary care; and it affirmatively appears that he was exercising no care.

Conceding (what is not clear) that the plaintiff was lawfully upon the fair grounds upon the occasion in question, from his own testimony it affirmatively appears that he was not there for any purpose within the legitimate scope of the corporate powers and duties of the defendants, but was there solely on a whip speculation, in no way connected with the proper objects of the fair.

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*Pitkin & Huse and T. R. Gordon*, for the plaintiff.

Corporations are liable for their negligent torts, and for the negligence of their officers and servants acting in the course of their official duty or employment, in the same manner and to the same extent that individuals are liable under the same circumstances. Mor. Cor. (2d ed.) ss. 725-734; Boone, Cor. s. 84.

The defendants, holding an exhibition or fair, were bound to use such care and prudence as prudent men in the exercise of prudence might use under the same circumstances, to have and keep the place provided for the exhibition or fair in a safe condition for those lawfully attending.

If they, their officers or servants, permitted to be used at that time and place a machine dangerous to be then and there used without some reasonable guard or precaution to forewarn of danger, and did not provide such guard or take such precaution, it was a breach of duty, or negligence, on their part; and if the plaintiff, without fault on his part, thereby received an injury, he was entitled to recover. *Lax v. Darlington*, 31 Eng. Rep. p. 543.

That such a machine, permitted so to be used, was, at the time the injury was received, being operated by a person not shown to be an officer or servant of the defendants, does not affect the plaintiff's right to recover. It is no defence or excuse that the negligence of another or third person concurred or contributed in producing the injury. 4 Wait, Act. & Def. 719. See Wart. Neg. s. 145.

The plaintiff was not chargeable with contributory negligence for not anticipating that the defendants would violate the law imposing upon them the duty of making due provision for the safety of those attending the exhibition or fair, and for not guarding against such possible violation. Thomp. Neg. p. 1172, s. 18.

Even when there is no conflict in the evidence questions of negligence and of contributory negligence are mixed questions of law and fact, to be submitted to the jury, if they involve

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the judgment of the trier as to the bearing which facts and circumstances as matters of fact, and not merely as matter of law, have upon each other. *Vinton v. Schwab*, 32 Vt. 612; *Whitcomb v. Denio*; 52 Vt. 382; *Drew v. Sutton*, 55 Vt. 586; *Fassett v. Roxbury*, 55 Vt. 552.

The opinion of the court was delivered by

TYLER, J. The plaintiff's evidence, upon which he rested his case, and upon which the defendants requested the court to direct a verdict in their favor, tended to show that the defendants, on September 8, 1884, and on the four succeeding days, held a joint agricultural and mechanical exhibition in Howard Park, in Burlington; that the plaintiff paid his entrance fee on the first day of the exhibition and was rightfully upon the grounds; that there was placed upon the grounds, about ten rods from the superintendent's tent, and in nearly a direct line between the tent and Floral Hall, a striking machine, consisting of a box from two and a half to three feet long, a foot and a half high, and about sixteen inches wide, and so contrived that a person striking with a mallet, weighing eight or ten pounds, could test his strength by means of a pointer or indicator arranged in the box; that the plaintiff was passing along by the usual route from the superintendent's tent towards Floral Hall, and when near the machine, and not observing it, some person suddenly took up the mallet, and in swinging it to strike a blow hit the plaintiff and broke his leg. It appeared that the accident occurred between two and three o'clock in the afternoon; that the machine was seen at that place by plaintiff's witnesses as early as twelve o'clock; and one witness was confident he saw it there between eight and nine o'clock in the morning.

The question presented by the plaintiff's evidence was whether or not the defendants were guilty of negligence in suffering this machine, with no guard around it, to remain upon the grounds at this place and at a time when visitors were

constantly passing and re-passing it. The court was requested to hold, as matter of law, that they were not.

Corporations are liable for their negligent torts, and for the negligence of their officers and servants acting in the course of their official duty or employment, in the same manner and to the same extent that individuals are liable under the same circumstances. Mor. on Cor. (2d ed.) ss. 725, 734; Boone on Cor. s. 84.

As the defendants were holding a public exhibition in this park, and inviting visitors thereto, it was their duty to render it a reasonably safe place for all persons who might lawfully be there in attendance.

It was claimed in argument by defendants' counsel that as the machine was not placed there by the defendants, and its use was foreign to the purposes for which these societies were organized, it was a case of *ultra vires*, unless the defendants recognized the act as done in their business; that there was no evidence that defendants had any interest in the machine, or that it was there by their permission, or that it was being used with their knowledge. There was evidence, however, that it was one of a kind of machines commonly exhibited at public gatherings of this kind, and that there were two or three of them on the grounds at this exhibition and in about the same locality. The court could not assume, as matter of law, that these machines, as well as the peddlers' stands, victualing tents and places of amusement were not there by the defendants' permission. If it were not to be assumed that the machine was there by license, it was a question of fact whether it had been so long upon the ground that the defendants ought, in the exercise of reasonable care, to have known of its presence. Whether it was dangerous or not depended upon its construction and the manner in which it was used. These were questions of fact, or at least mixed questions of law and fact, which could not properly have been decided by the court.

A remark made by REDFIELD, Ch. J., in *Vinton v. Schwab*,

32 Vt. 614, is applicable to this case: "But when there is no conflict in the testimony in regard to the particular facts, that will not always make it a mere question of law which the court may determine. If it still rests upon discretion, experience and judgment, it is matter of fact and not of law merely." It was said by Ross, J., in *Whitcomb v. Denio*, 52 Vt. 382: "Whatever may be the rule in other states in regard to its being the duty of the court, when the facts are undisputed, to determine as a matter of law, whether a thing has been done within a reasonable time, or with reasonable care, diligence, or prudence, or to determine any other fact which involves the judgment of the trier upon an existing state of facts and circumstances, it has been the almost universal practice in this State, from the earliest recollection of the oldest members of the court and bar, to submit such question to the determination of the jury." *Fassett v. Roxbury*, 55 Vt. 555. The only departure from this practice was in the often quoted case of *Briggs v. Taylor*, 28 Vt. 180.

A case in point, as illustrative of the one under consideration, is *Lax v. Corporation of Darlington*, 31 Eng. Rep. 543, cited in plaintiff's brief. In that case the defendants were owners of a cattle market, and in the market-place they had erected a statue, around which they had placed a railing as a fence. The plaintiffs attended the market with their cattle and occupied a particular site, for which they paid a toll. A cow belonging to them, in attempting to jump the railing, injured herself and died from the injuries. The jury found that the railing was dangerous. The court held that the defendants, having received toll from the plaintiffs and invited them to the market with their cattle, were in duty bound to keep the market in a safe condition; and that an action would lie for the plaintiffs' loss.

It is insisted by defendants' counsel that, to entitle the plaintiff to recover, it must appear affirmatively that he was in the exercise of at least ordinary care for his own protection; and that it did affirmatively appear that he was exercising no

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care at all, but on the contrary, was guilty of gross negligence.

To enable the plaintiff to make out a case it was incumbent on him to show that the defendants were negligent in regard to this machine, and that no want of care on his part contributed to the happening of the accident. Not that he could testify, or that witnesses could testify, in his behalf that he was in the exercise of due care; but the burden was on him to produce such a state of the evidence as would enable the trier of the fact to say that the defendants were negligent and that his own conduct was prudent. *Walker v. Westfield*, 39 Vt. 246; *Bovee v. Danville*, 53 Vt. 183.

The plaintiff's evidence shows the manner in which he was walking past this machine, not knowing of its existence. Whether he was in the exercise of that degree of care which the law requires, or whether he was guilty of contributory negligence, was a question of fact for the jury under proper instructions from the court. *Hill v. New Haven*, 37 Vt. 501.

The judgment of the County Court affirmed.



RUTLAND COUNTY, JANUARY TERM, 1888.

Present: ROSS, POWERS, VEAZEY and TYLER, JJ.

NATIONAL LAND AND LOAN CO. v. JOHN A. MEAD.

*Constitutional Law.*

The Constitution does not require the governor to sign a bill at its end in order that it may become a law; it is sufficient if he approves it and signs it in any place intentionally and understandingly; thus, when he signed a bill at the end of the second section, and on discovering his mistake erased his name and failed to subscribe the bill until after the time for signing bills had elapsed, it was held, to be a valid law.

ACTION of assumpsit upon a subscription to the capital stock of the plaintiff corporation. Plea, *nul tiel* corporation. Trial in the municipal court of Rutland, LAWRENCE, J., presiding.

Judgment *pro forma* for the defendant.

The plaintiff offered in evidence a copy of its act of incorporation, certified to by the secretary of state, as follows:

"STATE OF VERMONT, }  
Office of Secretary of State. }

"I hereby certify that the foregoing is a true copy of a document entitled 'An Act to Incorporate the National Land and Loan Company,' now in this office; and that the words 'Approved Nov. 25, 1884, Sam'l. E. Pingree, Governor,' were written thereon by said Sam'l. E. Pingree on the 25th day of March, A. D. 1885."

It appeared by the journals of the senate and house of representatives for the biennial session of 1884, of the General

Assembly. that Senate Bill 159 entitled "An Act to Incorporate the National Land and Loan Company" was passed by the senate and house of representatives in due form, and that the governor in a message to the senate, through his secretary of civil and military affairs, announced in due form that on the 25th day of November, 1884, he had approved and signed said bill; and that such action of the governor was duly communicated from the senate to the house of representatives.

The plaintiff also introduced the affidavit of Samuel E. Pingree, and the court found the facts as therein stated to be true.

Gov. Pingree's affidavit:

"I was the governor of the State of Vermont during the biennial term commencing in October, 1884. During the last days of the session of the General Assembly of 1884 a bill originated in the senate entitled 'An Act to Incorporate the National Land and Loan Company,' and which had passed both houses, was sent to me for my approval. I examined the same carefully and found it approvable and signed it, and my approval was duly transmitted to the senate through the secretary of civil and military affairs. I signed the bill under the signatures of the president of the senate and speaker of the house; but after I had signed it, it was discovered that they had signed at the bottom of the first page of the bill, being at the end of section two. I intended to approve and did approve the entire bill; and that all things might be regular in regard to the bill, when it was found out that the president of the senate and speaker of the house had not signed at the end of the bill, I erased my signature and the bill was sent specially to them to sign at the end and after that was done I intended to replace my signature at the end. The president of the senate and speaker of the house did sign the bill at the end in regular manner and it came back for me to replace my signature at the end; but in the hurry of the last hours of the session it was sent to the office of the secretary of state without being clerically completed on my part. I intended to have replaced my signature at the end of the bill before it was sent to the secretary of state, but after the session was finally adjourned my attention was called to this bill and the fact that I had not done so, and some time in March, 1885, while at Montpelier,

I replaced my signature in regular form at the end of the bill and wrote the words, ' Approved Nov. 25, 1884, Sam'l Pingree, Governor.'

SAM'L E. PINGREE."

*Edward Dana and W. C. Duntun*, for the plaintiff.

Governor Pingree knowingly and intentionally approved and signed the bill.

This was all that was necessary after the bill had been passed by the two houses for it to become a law. Const. Vt. Art. 11.

Any signing with the intention of signing in approval is sufficient, whether at the end or in any other part of the bill. Brown Stat. Fra. Sec. 357; *Brink v. Spaulding*, 41 Vt. 98; *Adams v. Field*, 21 Vt. 256, 266.

The governor having duly approved and signed the bill within the time limited by the Constitution, it became a law, and having once become a law it could not be repealed and become of no effect simply because the governor afterwards desired his signature to be placed at the end in the more regular manner, and erased his name for the purpose of afterwards replacing it at the end.

*P. R. Kendall*, for the defendant.

The erasure of the governor's signature caused the secretary of state not to print the act among the laws, and it may well be doubted whether the bill ever became a law. Const. Vt. Art. 11.

In the case of *Fowler v. Pierce*, 2 Cal. 165, an act passed on the last day of the session was presented to the governor on the same day and purported to have been approved on that day. It was shown by parol that it was not approved on that day, but on the next day. Held that the act was void. 12 U. S. Dig. 702, s. 34.

In the case of *People v. Hatch*, 19 Ill. 283, an act was signed by the governor by mistake and a message was delivered to the house of representatives by his private secretary, announcing his approval, and this was not done by the special

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direction of the governor, but according to usual routine of business, because he had found it on the governor's table, with his signature attached. The governor, within thirty minutes of the message, sent a notice of the facts to the speaker of the house, which he read aloud. The act was returned with the governor's signature erased and with his objections thereto. Held that the act never became a law.

In the case at bar, it would seem that only a part of the bill was signed.

The opinion of the court was delivered by

VEAZEY, J. The Constitution of this State is as follows: "Every bill which shall have passed the senate and house of representatives, shall, before it becomes a law, be presented to the governor; if he approve, he shall sign it; if not, he shall return it, with his objections in writing, to the house in which it shall have originated;" etc.

This bill passed both the senate and house, was presented to the governor, was carefully examined by him, and was by him approved and signed intentionally and understandingly. The bill thereby became a law. That which took place afterwards did not annul this enactment. It was not even so intended if the power existed. The governor did not attempt to withdraw his approval. The place of signing was as effectual as though it had been at the end of the bill, the fact appearing that it was intended as a signing and approval of the entire bill. *Brink v. Spaulding*, 41 Vt. 98; *Adams v. Field*, 21 Vt. 256. The Constitution does not require that a bill shall be signed at the end, or subscribed.

The *pro forma* judgment is reversed, and judgment rendered for the plaintiff.

## DEXTER GILBERT v. EDWARD J. VAIL.

*Insolvent Law.* R. L. ss. 1860, 1966. *Chattel Mortgage.*

1. **CHATTEL MORTGAGE.** A chattel mortgage executed more than four months, but recorded only ten days, before the filing of a petition in insolvency against the mortgagor, is valid. R. L. ss. 1860, 1966.
1. **AFFIDAVIT.** An affidavit in a chattel mortgage is sufficient, which states that the mortgage was made "for the purpose of securing the *debt* specified in the condition thereof," where the condition showed that the mortgage was given to secure the mortgagee against liability as an endorser for the mortgagor.
3. **JURAT.** In an action of replevin between the representative of the mortgagee and the vendee of mortgagor's assignee, involving the validity of a chattel mortgage, the *jurat* annexed to the affidavit, is conclusive as to whether the parties to the mortgage were sworn.
4. **EVIDENCE.** It was not error to reject evidence that the notes endorsed by the mortgagee had been proved against the insolvent estate before he had taken them up.
5. **ESTOPPEL.** Evidence was offered to show that the plaintiff, just before the mortgage was recorded, told the mortgagee that he must abandon his mortgage, and that he replied that it was good for nothing, as it had not been recorded; *Held*, that the offer lacked several of the essential elements of an estoppel *in pais* as it was not proved that the plaintiff performed any act in reliance upon the reply; and there was no error in rejecting it.

**REPLEVIN.** Trial by court, Rutland County Court, March Term, 1887, TAFT, J., presiding. Judgment for the defendant for a return of the property and \$70 damages and his costs. The defendant was the constable of the town of Pawlet. The mortgagee, Whitcomb, after the sale of the cows in contention by the assignee, put his chattel mortgage into the defendant's hands, and directed him to take the cows; and thereupon he did take said cows by virtue of the mortgage, and was proceeding to advertise and sell the same according to the provision of the statute when they were replevied. The fourth exception states: "The plaintiff also produced the files and

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records of the Court of Insolvency for the District of Rutland, and offered to show that both said notes described in said mortgage were proved against the insolvent estate of O. J. and O. E. Train by the persons who owned and held them at the time of the first meeting of creditors in said proceedings, and before said Whitcomb paid said notes. The defendant objected, and the court excluded the testimony, to which the plaintiff excepted."

The other facts are sufficiently stated in the opinion of the court and headnotes.

*D. E. Nicholson and J. C. Baker*, for the plaintiff.

The assignment, under order of the court, vests in the assignee all the property of the debtor. R. L. s. 1820. All fraud and collusion by which one creditor procures an advantage are set aside. R. L. s. 1860-1. These cows could have been taken on exception against the debtors. R. L. s. 1180. Hence they vested in the assignee. The mortgage is void unless it has relation back to the day when it was made. R. L. ss. 1861, 1966.

This case is the best illustration of the fallacy of allowing a party to take a secret conveyance and keep in his pocket until the four months have expired and then putting forth the claim of a perfect title. It nullifies the law, if the very collusion and fraud which it condemns may be made the instrument for the protection of fraudulent preferences.

This cannot be allowed in the face of the statute declaring that such a mortgage shall not be valid until recorded.

The fact that both mortgagee and mortgagor are in collusion to defraud all others, and act with that direct intent, no way gives legal validity to their work.

The affidavit was not such as the law requires. R. L. s. 1969; *Tarbell v. Jones*, 56 Vt. 312; *Jones Chat. Mort.* ss. 36, 37. It does not describe the liability secured. As to what an affidavit is see 1 Rapal. & L. Law Dic. 36.

An oath requires some ceremony. It cannot be taken in

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silence. 1 Phil. Ev. 15, 17; 1 Greenl. Ev. s. 328; 1 Best Ev. ss. 56, 58; *State v. Trask*, 42 Vt. 152. The certificate of the justice is not conclusive. *Hubbard v. Dewey*, 2 Aik. 316; *Taylor v. Holcomb*, 2 Tyler, 344; *Morey v. McGuire*, 4 Vt. 327; *Lemington v. Blodgett*, 37 Vt. 210; *Benedict v. Heinberg*, 43 Vt. 236. The same is true of officers' returns. *Hathway v. Goodrich*, 5 Vt. 65; *Stanton v. Hodges*, 6 Vt. 66; *Barrett v. Copeland*, 18 Vt. 67; *O'Reilly v. People*, 86 N. Y. 154. The plaintiff cannot be estopped to inquire as to whether the oath was actually taken, as he was not a party to the mortgage.

*Lawrence & Meldon*, for the defendant.

The *jurat* was conclusive. It is a matter of record and cannot be impeached by parol in a collateral proceeding. The mortgage was seasonably made and recorded. *Folsom v. Clemence*, 111 Mass. 273; *In re Wynne*, 4 B. R. 23; *Seaver v. Spink*, 8 B. R. 218; *Cragin v. Carmichael*, 11 B. R. 511; *Gibson v. Warden*, 14 Wall. 244; *Bump, Bankruptcy*, 815.

In construing the affidavit reference may be had to the condition of the mortgage as set forth; and if by such reference the affidavit fairly sets forth the obligation assumed, it is sufficient. *Gardner v. Parmelee*, 31 Ohio, 551.

Opinion of the court was delivered by

Ross, J. The controversy is in reference to the title and right to the possession of fourteen cows. The plaintiff claims title by reason of a purchase at the sale by the assignee in insolvency of O. J. & O. E. Train, and the defendant, the representative of Austin S. Whitcomb, by virtue of a chattel mortgage from the Trains. The sale by the assignee was of the whole title to the cows. It was not a sale of the equity of the Trains, regarding the mortgage to Whitcomb as a subsisting lien. None of the provisions of the statute regulating the sale of the equity of the Trains, or of their assignee, in the property, was complied with. It was a sale in defiance of Whit-

comb's rights, or lien upon the property. The plaintiff's title must stand upon the grounds on which the assignee proceeded in making the sale; that is, treating the mortgage to Whitcomb as absolutely void as against the assignee in insolvency. Hence, the principal question is, was that mortgage void as against the assignee in insolvency? The County Court has found that the mortgage was made more than four months prior to the filing of the petition in insolvency, but that it was recorded only ten days before the petition in insolvency was filed. The court has also found that the Trains were insolvent at the time they executed and delivered the mortgage; that it was executed to give a preference to Whitcomb; that Whitcomb then had reasonable cause to believe the Trains insolvent; and that the mortgage was in fraud of the laws relating to insolvency. Hence, the mortgage, if made within four months of the petition of insolvency would be void. It is also found that Whitcomb before the making of the mortgage had endorsed two notes for the Trains, amounting to two thousand dollars, which were then outstanding, and that the mortgage was made to secure Whitcomb against the liability which he had incurred, and was then under, by reason of having indorsed these notes. The plaintiff urges several objections against the validity of this mortgage.

I. He contends that it was invalid, because it had not been recorded for four months before the filing of the petition in insolvency. The answer to this objection is, that the statute does not require such record to be made for four months before the filing of the petition in insolvency. Sec. 1860, R. L., only requires that the mortgage shall have been *made* four months, or more, before the filing of the petition in insolvency. Sec. 1965, R. L., authorizes the making of mortgages of all personal property. Sec. 1966, R. L., declares that such mortgages "shall not be valid against any person except the mortgagor, his executors and administrators," unless possession is taken of the property, or the mortgage is duly recorded. Sec. 1860 of the insolvent law of this State, under which this



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mortgage must be held invalid, if at all, is almost a verbatim copy of section 89 of the Massachusetts insolvent law, and of sec. 5188 U. S. R. L. of the late Bankrupt Law. These had received judicial interpretation before the passage of our insolvent law; and it is fair to presume that the legislature enacted sec. 1860 understanding that it had received judicial construction. It had been repeatedly held in the administration of the U. S. Bankrupt Law, that the preference declared to be in fraud of the law if made within the time limited, was not fraudulent if made before the time limited, and that deeds of trust and mortgages executed prior to, but recorded within, the four months before the commencement of the proceedings in bankruptcy were valid. See authorities cited pp. 796-7 (8th ed.) Bump's L. & P. of Bankruptcy; Jones Chat. Mort. s. 364. It is questionable whether under the decisions of the United States Supreme Court the assignee would take more than the equity of the mortgagor in the property, if the mortgage had remained unrecorded. *Stewart v. Platt*, 101 U. S. 731, (325 L. ed. 816.) By sec. 1966, such mortgage, unrecorded, is valid against the mortgagor, his executors and administrators. There is considerable force in the argument that an assignee in insolvency is, in legal effect, an executor or administrator of the estate of a deceased business man, and takes as absolutely and limitedly the rights of the insolvent as an executor or administrator does those of the intestate, and no more or greater rights. But as the mortgage to Whitcomb was recorded before the commencement of the proceeding in insolvency, under sec. 1966, it was valid against the creditors of the insolvents, as well as against them. This objection to the mortgage is not sustained.

II. The plaintiff further contends, that the mortgage is invalid because the affidavit required by the statute was not made by the mortgagors and mortgagee, in that it does not properly describe the liability of the mortgage which was intended to be secured. The condition of the mortgage states with sufficiency and precision, that the mortgage was to secure

Whitcomb against the liability incurred by reason of having endorsed the insolvents' two notes which are described. The affidavit is that the "mortgage is made for the purpose of securing the debt specified in the condition thereof." The plaintiff contends there is no debt to Whitcomb described in the condition of the mortgage. Technically, this contention is true. Yet no reasonably intelligent person, on reading the affidavit, and then the condition of the mortgage, which is referred to for a description of the debt secured, would entertain a doubt of the intention of the parties to the mortgage, or, that it was intended to secure Whitcomb against the liability which he had incurred for the mortgagors by endorsing the notes described. In its broad sense, debt means duty, or what one owes to another. The Trains owed Whitcomb the duty to save him from the payment of notes described, and to secure the performance of this duty, or debt, the mortgage was executed. We think the affidavit is sufficient.

III. The plaintiff called the justice, who signed the *jurat* to the affidavit to the mortgage, and, after having him recognize his signature, and answer certain inquiries, asked him "if he administered any oath to any of said parties, or if either Orange J. Train, Orange E. Train, or said Whitcomb, were sworn to said affidavit." This inquiry was objected to and excluded by the court against the plaintiff's exception. Neither the ground of the objection, nor exclusion is stated. But we think the exclusion may well be upheld upon the ground that the certificate was the record of the justice of the peace of an official act required by law to be done, and to be recorded upon the mortgage, and was conclusive evidence of the fact certified and recorded, at least between the parties to the mortgage, and their privies. The plaintiff is a privy to the record through the assignee and the Trains who were the mortgagors. It is like the record of a recognizance. *Beech v. Rich*, 13 Vt. 595. It has often been held that parol evidence cannot be admitted to vary, or alter the records of a justice of the peace, whether the matter arises collaterally, or upon the

writ of *audita querda* brought to set aside the judgment, and, if at all, only in a proceeding to correct the record. *Eastman & Page v. Waterman*, 26 Vt. 494.

IV. It is evident that Whitcomb could not be affected by the proof of the notes by their owners, against the insolvents, before he had taken them up as the endorser. It was not, therefore, error in the County Court to reject such offered proof.

V. The offered testimony of what the plaintiff told Whitcomb about his mortgage, and of Whitcomb's reply, was properly excluded. It was not shown, nor offered to be shown, that Whitcomb's reply was made to induce, or under circumstances which ought to have led him to suppose it would induce, any action by the plaintiff in reliance upon it; or, that the plaintiff performed any act in reliance upon his reply. Hence, the offer lacked several of the essential elements of an estoppel *in pais*. The result is, that we find no error in the proceedings of the County Court, and the judgment of that court is affirmed.

## HERBERT SHORO v. ANNA SHORO.

*Marriage. Divorce. Duress.*

A marriage may be annulled when it has been procured by duress; thus, a marriage was annulled on proof that the consent of the petitioner, a boy sixteen years old, was extorted by bastardy proceedings, maliciously instigated by the petitionee without probable cause.

PETITION to annul a marriage contract under section 2349 of the Revised Laws. Trial by court at September Term, Rutland County Court, 1887, ROWELL, J., presiding. Petition dismissed as a matter of law. Section 2349 R. L. is as follows: "The marriage contract may be annulled when \* \* \* or when the consent of either party was obtained by force or fraud." The exceptions stated that "the petitioner had the alternative of going to jail or of marrying the petitioner." The other facts are sufficiently stated in the opinion.

*Ormsbee & Briggs*, for the petitioner, cited Scholu. Dom. Rel. p. 37; 1 Bish. Mar. & Div. (4th ed.) s. 211; *Clark v. Field*, 13 Vt. 460; 11 Vt. 226; *Scott v. Schufeldt*, 5 Paige, 43; *Reynolds v. Reynolds*, 3 Allen, 610.

The opinion of the court was delivered by

Ross, J. This is a petition to have the marriage solemnized between the parties annulled, alleging among other things that the petitioner's consent was obtained by force and fraud. It comes to this court on the facts found by the County Court, and the exceptions of the petitioner to the refusal of the County Court to annul the marriage.

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We have given the matter somewhat careful attention, both because the marriage contract is one in which the public generally is interested, and because no attorney has appeared for the petitionee.

The controlling facts found by the County Court are that the petitioner, a lad sixteen years old, never had sexual intercourse with the petitionee before or after the performance of the marriage ceremony, and never cohabited nor lived with her. She was older, of bad repute for chastity, and without probable cause, maliciously caused him to be arrested upon bastardy proceedings. He was greatly frightened by the arrest, protested his innocence, but was told by the officer he must get bail or go to jail. He applied to his father to bail him and was refused. The father told him to marry her, or go to jail, and advised him to marry her and not live with her. When protesting his innocence to the officer, the officer assured him, that would not save him. He took his father's advice, went through the marriage ceremony performed by the magistrate who signed the warrant for his arrest, while under arrest, in the presence of the officer, and while greatly frightened, with the fixed intention of never living with her, which he has fully carried out. Can there be a doubt that the marriage ceremony was procured by duress? What is duress? Says Mr. Bishop, Vol. 1, Marriage and Divorce, s. 210: "Where a consent in form is brought about by force, menace, or duress,—a yielding of the lips, but not of the mind—it is of no legal effect." Bacon's Abridgement under the title Duress: "If a man takes A. S. to wife by duress, though the marriage be solemnized *in facie ecclesiæ*, yet it is merely void, and they are not husband and wife, for without free consent there can be no marriage." Again he says: "It seems clearly agreed, that where a person is illegally restrained of his liberty by being confined in the common jail, or elsewhere, and during such restraint enters into a bond or other security, to the person who causes the restraint, he may avoid the same for duress or imprisonment." Mr. Bishop in section 213 gives

a case agreeing in its facts with the facts found by the County Court in the case at bar except the arrest was made without warrant, in which the marriage was annulled for duress. He intimates that if the arrest was on a legal process, it would be otherwise. No doubt that would be true if by "legal process," he means, one issued for legal cause. But, as to the petitionee, the process on which she caused his arrest, was a pretence, a fiction; because procured maliciously, and without probable cause. If anything, it was worse than an arrest without process, but claiming to have one. Mr. Bishop, s. 212, says: "A doubt may be entertained whether a process would not be void, if shown to be both malicious and without probable cause." But illegal pretence, as it was, so far as regards the petitionee, it accomplished her wicked and unlawful purpose, frightened the boy, and caused him to consent to the performance of the marriage ceremony in form only—a yielding of his lips but not of his mind. *Sartwell v. Horton*, 28 Vt. 370, and *Hoyt v. Dewey*, 50 Vt. 465, are full authority that money procured by a threatened arrest, on a charge which the maker knows to be false and without foundation in fact, may be recovered back. In *Sartwell v. Horton*, the case of *Cadaval v. Collins*, 4 Ad. & Ell. 858 is cited with approval. The case and decision is stated as follows: "That was an action to recover money paid to the defendant after the plaintiff had been served with process. The fact was found by the jury that the defendant knew that he had no claim upon the plaintiff when he sued out his writ. COLERIDGE, J., observed that "no case has decided that when a fraudulent use has been made of legal process, both parties knowing throughout that the money claimed was not due, the party paying under such process is not to have the assistance of the law." PATTERSON, J., observed that "the jury concluded that the defendant knew that the debt did not exist, and that he used the process colorably. To say that money obtained by such extortion can not be recovered back would be monstrous." Much more monstrous in our judgment, would it be to hold that a boy only

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sixteen years old whose verbal consent to a marriage ceremony had been extorted by the use of a process known to be without probable cause, and used maliciously, instigated and set on foot by an unchaste, pregnant woman of mature age, cannot be relieved from the life-long bondage of such a wife.

The judgment of the County Court is reversed, the pretended marriage annulled and vacated.

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G. L. MUSSEY v. A. C. BATES AND S. C. CURTIS.

[IN CHANCERY.]

*Deed, when a Mortgage. Pleading. Practice. Written Agreement. Parol Evidence.*

The question made by the pleadings was whether a deed absolute in form was a mortgage; and on the hearing before the master, the parties entered into a written agreement relative to the accounting and the final disposition of the case; *Held*, that parol evidence, as the agreement was not ambiguous, was not admissible on a subsequent hearing to show that the real agreement was not expressed in the writing as understood by the orator; and that the case is wholly unlike *Flint v. Johnson*, 59 Vt. 190, where the pleadings were adapted to the reformation of the agreement, though made after the original suit was commenced.

**BILL IN CHANCERY.** Heard on the pleadings, a special master's report and exceptions thereto, March Term, 1887, TAFT, Chancellor. The 1st and 2d exceptions overruled; the 3d exception sustained; and decree for the orator in accordance with the prayer of the bill. It was further adjudged that there was due the defendants the sum of \$21,496.73; and the orator was ordered to pay it on or before August 1, 1887, and on payment of it, the defendants were to convey to him.

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The 1st exception related to the master's refusal to receive parol evidence as to the construction of the stipulation; and the 2d exception, to his refusal to receive evidence to prove that a tender had been made to the defendants of what they had expended on the farm in dispute, and \$500.00 in excess to cover incidental expenses. It appeared that the defendants claimed \$2950.00 for their personal services in carrying on the farm, and that the master allowed them therefor \$954.00. The 3d exception was taken to the allowance of this claim. The master also allowed to the defendants the sum of \$21,496.73, money paid for the farm, stock, improvements, interest, etc. The agreement entered into by the parties contained the following clause: "If there shall arise any question of the propriety of any improvement and expenditure made by defendants upon the property, the master, or person to whom the same is referred, shall allow for all expenditures that a prudent man would have made if he owned the property."

The orator offered to prove by Mr. F. M. Butler, that he, Mr. Baker, Judge Dunton and George L. Mussey were present at the time of signing the said agreement; that some objection to the above quoted clause was made; that Mr. Baker stated that the stipulation did not change the law, that the rule of law that would be applied in case Mussey should prevail would be the same, as stated in the stipulation; and it was stated that the stipulation, would be construed, to mean an "owner of the property under similar circumstances, and with a similar title;" and Mr. Baker said, it would be so construed as he understood him, that it would hold them to good faith in the expenditures, and to similar ownership. Mr. Mussey hesitated somewhat, but after the aforesaid statement of Mr. Baker, he signed the paper.

The orator also offered to prove that he sent an agent to defendant Bates, who offered to pay him what he had expended for the orator and \$500.00 in addition, if they would give Mussey a clear deed of their right; and that Bates said that he should do nothing about it. The offered evidence was refused.



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The said agreement contained the following clause: "This stipulation is made without any admission of the truth of any matter charged in said bill of complaint, and said Mussey is not to have or claim any interest or right in or to said land by reason of this stipulation except by making payment as hereinafter stipulated."

*C. H. Joyce*, for the orator.

The case of *Flint v. Johnson*, 9 Alt. Rep. 364 (59 Vt. 190) is full authority, that the offered evidence was admissible to prove that before, and at the time, this stipulation was made it was talked over, and agreed between the parties, that a certain clause in it, should not be construed to change the legal rights and status of the parties, as they then stood under the law.

It was also proper to show that before this bill was served, the orator offered to pay defendants, and that they refused it; as the refusal obviated the necessity of making a tender.

*J. C. Baker*, for the defendants.

Decrees by consent made upon stipulations are favored, and should be adhered to.

No proceeding was pending or had been commenced to attack or set aside this stipulation or the direction to the master to take the account according to it.

The opinion of the court was delivered by

Ross, J. The bill alleges that certain absolute deeds held by the defendants were given to secure them for money advanced for the orator, and he prays to have the conveyances declared to be mortgages, and to be allowed to redeem. The defendants deny that the conveyances were given as security for money advanced, and affirm that the conveyances were absolute, and given to them as purchasers of the property described in the deeds. The answer was traversed, the case referred to a master, and, after one or two days' hearing, the

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parties came to an agreement, which they put in writing, by which the master was to take the account of the cost of the premises to the defendants, according to the stipulation of the parties, and that, if the orator should then pay the sum, found by the master, as the cost of the premises to the defendants, they were to re-convey the premises to the orator, or the court should decree a reconveyance; and, if the orator failed to pay the sum found, the bill was to be dismissed. The accounting went on before the master, who proceeded therein in accordance with the plain terms of the stipulation of the parties, and ascertained the sum due the defendants. During the hearing the orator offered certain testimony tending to show that the stipulation signed by the parties relative to the accounting, did not express the real agreement of the parties as understood and made by the orator. It is not contended that the terms of the stipulation are ambiguous, nor that the master has failed to interpret them correctly, as written. The master excluded the offered evidence. This is the supposed error of which the orator complains. We think the master was clearly right in excluding the offered evidence under the state of the pleadings. The offered evidence could have relation only to reforming the written stipulations entered into by the parties. The bill was not framed, nor the pleadings adapted to any such issue. On the pleadings no reformation of the stipulations could be decreed by the court, and no such issue was before the master. The case is wholly unlike *Flint v. Johnson*, 59 Vt. 190, cited by the orator's solicitor. In that case the pleadings were adapted to the reformation of the agreement of the parties. The Court of Chancery properly overruled the orator's exceptions to the master's report. The decree of the Court of Chancery is affirmed, and the cause remanded.

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Blaney v. Pelton.

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## WILLIAM A. BLANEY v. GEORGE E. PELTON.

*Bills and Notes. Negotiable Instruments. Consideration.  
Defence.*

1. It is presumed that the holder of a negotiable note is a *bona fide* holder; and when he produces it in court and proves its execution, he makes out a *prima facie* right of recovery, and is not bound to fortify his title to the note beyond the presumption, when the defence is an entire failure of consideration, and the defendant falls in such defence.
2. The defendant executed his negotiable note in part payment for a printing press, and, having used it for several months in the precise kind of work for which it was purchased, he exchanged it for another machine, realizing for the press more than he was to pay for it. He only complained that it would not do the work so well and so advantageously as the vendor represented; *Held*, that the defendant's claim came far short of the defence of an entire failure of consideration.

ASSUMPSIT upon two promissory notes. Trial by jury, March Term, 1887, TAFT, J., presiding. Verdict directed for the plaintiff. Affirmed.

The plaintiff introduced the notes in evidence and rested. The defendant then introduced evidence tending to show that prior to December 1, 1883, he had made a contract with the Goodwillie-Wyman Co., of Boston, Mass., to purchase of said company a printing press known as a No. 2 Whitlock Press; that by the contract the defendant was to turn in towards said press one old Hoe press at \$550, and a horse and other merchandise at \$200, and said Goodwillie-Wyman Co. took said property to Boston; that during the interval between the time of said contract and the time when said company could furnish the press sold the Goodwillie-Wyman Co. undertook to set up

in the defendant's office, in Rutland, a No. 1 Whitlock Press, for the use of the defendant, until they could deliver and set up the press sold; that a man was sent from Boston to set up the press sent up for temporary use; and while he was at work on said press, and some time after December 1, 1883, he was ordered to return home, as said Goodwillie-Wyman Co. had failed in business. The press was set up, but was not so as to work, and was not in condition to indicate whether it would work successfully or not. The defendant's testimony further tended to show that, when this notice was received that the Goodwillie-Wyman Co. had failed, the defendant went to Boston to try to save the property that he had delivered to the Goodwillie-Wyman Co. on said contract, and while there he made a contract for the press then standing in his office in Rutland. The defendant then introduced a copy of a written order signed by him for said No. 1 Press, and testified that at the time of making said contract the president of said Goodwillie-Wyman Co. represented to the defendant that said press would do any work any two-roller printing-press would do, and would run at the speed of one thousand impressions per hour; that, as part of this contract, the defendant executed the two notes in suit, and that the other property named in said order was the same property delivered as aforesaid under the first above-named contract, and that said first contract was rescinded at the time of making this last contract.

The evidence of the defendant further tended to prove that the press purchased by this last contract was deficient in all the essential working qualities of a printing press; that the bed, which should be perfectly true, was uneven; that the cylinder was uneven and sprung; that the delivery of printed sheets would not work with the other parts; and that the ink fountain was entirely useless; and that as a printing press it was entirely worthless and of no value.

The defendant testified, on cross-examination, that said press was of no value as a printing press, but that he kept it in his office for nine or ten months, and used it more or less

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in his business, but that the extra help and expense of running it, and the inferior character of the work it would perform, rendered it of no value as a printing press. Among other witnesses, the defendant called the foreman of his office, who testified to the condition of the press, and that it was of no value as a printing press, but, on cross-examination, said it would be of some value in a country office for ordinary small coarse work, like auction bills, but was of no value to defendant.

The defendant also introduced evidence tending to prove that one George H. Robinson, of New York, was a stockholder and director of the Goodwillie-Wyman Co. up to, or about to, the time of its failure; that he had advanced money to the company from time to time; that all the property turned in by the defendant for said press and these two notes did not go into the hands of the receiver of said company, but all went into the hands of said Robinson; and that said Robinson paid no value for them except he applied them upon the indebtedness of the company to him. The defendant also claimed from the depositions of the plaintiff and of said Robinson that the plaintiff paid no value for said notes, but received them as a gratuity from said Robinson a long time after one of them was due.

*J. C. Baker*, for the defendant.

Robinson was not a *bona fide* purchaser of the notes. He was a creditor of an insolvent corporation, and absorbed its property after its failure. *Sanford v. Norton*, 14 Vt. 234; *Gould v. Stevens*, 43 Vt. 125; *Langdon v. Baxter Nat. Bank*, 57 Vt. 1; *Russell v. Buck*, 14 Vt. 147; *Roth v. Colvin*, 32 Vt. 125.

He took these notes after one of them was dishonored. It was sufficient to put him on inquiry. Where a note is given upon a consideration which has failed by reason of fraud entering into it, no offer to rescind the contract is necessary. *Kelly v. Pember*, 35 Vt. 183.

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The court directed a verdict for the plaintiff. This was error if there was any evidence tending to establish a legal defence. *Rogers v. Judd*, 6 Vt. 191; *Jones v. Booth*, 10 Vt. 268; *Wemet v. Missisquoi Lime Co.* 46 Vt. 458; *Lewis v. Pratt*, 48 Vt. 358; *Reed v. Reed*, 56 Vt. 492.

The question of whether defendant offered to rescind was for the jury. *Gates v. Bliss*, 43 Vt. 299.

*Lawrence & Meldon*, for the plaintiff.

Robinson took these notes while current and applied them on the indebtedness of the company to him. This constitutes him a *bona fide* holder for value, and neither he nor his endorsee could be affected by any equities that might exist between the original parties. *Russell v. Splater*, 47 Vt. 273; *Noyes v. Landon*, 47 New Eng. Rep. 724; 59 Vt. 569.

If the defendant would avail himself of a failure of consideration, he should return, or offer to return, the property for which the notes were given. 1 Pars. 204-205; *Thornton v. Wynn*, 25 U. S.; 12 Wheat, 183 (6 L. ed. 595). See *Kase v. John*, 10 Watts, 107.

But he admits that he did not do this, but instead turned it in trade for another press, whereby he received the full price he paid for it, which would render him liable on the notes. *Foster v. Phaley*, 35 Vt. 303.

But even if there had been a partial failure of the consideration, it would be no defence to this suit. Rev. Laws, s. 911; *Farrar v. Freeman*, 44 Vt. 63; *Thrall v. Horton*, Id. 386. And this, although the holder took the notes when over due and with notice of such partial failure. Rev. Laws and *Thrall v. Horton*, *supra*.

The opinion of the court was delivered by

POWERS, J. This is an action of assumpsit upon two notes made payable to the order of the Goodwillie-Wyman Co. The defence is an entire failure of consideration.

When the plaintiff produced the notes in court, and proved

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their execution, he made out a *prima facie* right of recovery. The holder of negotiable paper is presumed, in the first instance, to be a *bona fide* holder.

If the defendant offers evidence tending to prove fraud in obtaining the note, or an entire failure of consideration for it between the original parties, the burden of proof is thereby cast upon the plaintiff to show that he was an innocent purchaser, for value, of the notes while they were current. This burden, however, is not cast upon the plaintiff until the consideration is impeached by the defendant. Hence no inquiry into the title of Robinson or the plaintiff is demanded until it is made necessary by the state of the defendant's case.

This case is quite unlike *Cragin v. Fowler*, 34 Vt. 326, and *Clough v. Patrick*, 37 Vt. 421, cited by defendant. In those cases the thing purchased had no value whatever. The rule was stated by Judge PIERPOINT in Cragin's case as follows: "The party has the right to that for which he bargained substantially, and it must be of some value or he is not bound to pay for it."

If the article bought does not fully come up to the representations of the vendor, but still is an article of the kind bargained for, and will perform the work for which it is designed, though less efficiently than represented, the purchaser in a proper case may have his action for deceit or false warranty. But this comes far short of the elements essential to the defence of an entire failure of consideration.

In Cragin's case the machine was bought as and for a machine to be operated by horse power. It could not be operated at all by that power. If this press had been bought as and for a steam-power press, but could be operated only by hand power, the case would be parallel with Cragin's case. The press, however, worked in the manner contemplated by the purchaser, and he only complains that it will not do the work contemplated so well and so advantageously as the vendor represented.

The defendant used it for several months doing the precise

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kind of work for which it was purchased, though it came short of his expectations, and finally exchanged it for another machine, realizing in the exchange more for the press than he was to pay for it. It would seem rather novel to hold that a purchaser, who gets his money back for an article he buys, can claim that he received no value. The defendant's own testimony disclosed this state of facts; hence, no duty was cast upon the plaintiff to fortify his title to the notes beyond the presumption arising from his holding them.

Judgment affirmed.

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LUCIUS F. GOODRICH v. DORSET MARBLE COMPANY.

*Water Course and Water Rights. Measure of Damages for Flooding Another's Land. Evidence. Question for Jury.*

1. In an action against a marble company for depositing sand in a stream whereby a sand-bar was formed and the plaintiff's land was flooded, he is entitled to recover for all injuries to his crops and land, which were occasioned by the defendant's unlawful acts committed before the commencement of the suit, including the effects of such acts, which became apparent subsequent to the commencement.
2. Evidence is admissible to prove the full effect of the unlawful flooding of lands, although it tends to show some injury caused by acts committed after the commencement of the suit.
3. It was for the jury to decide as a question of fact, whether the sand-bar formed by the defendant's deposition of sand in the stream obstructed the water.

TRESPASS on the case for flooding the plaintiff's land. Trial by jury, September Term, 1887, ROWELL, J.; presiding. Verdict and judgment for plaintiff.

The writ was dated and served February 6, 1886. The plaintiff made no claim prior to the season of 1885. It appeared from



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his own testimony, that his meadow is situated upon Castleton River about a quarter of a mile above the defendant's marble mill; that said river at this place was a sluggish stream, the meadow being nearly level; that below defendant's mill and near the stream, are situated the marble mills of several other companies; and that all, including defendant, have for several years run off sand mixed with water from the saws of their mills into the stream.

The defendant denied that the "sand-bar" complained of, was the cause of flowing his land, and also claimed that plaintiff could recover, if at all, only for the damage to his hay crop in 1885; while plaintiff claimed to recover for damages to his land as well.

The court ruled that plaintiff could recover, if at all, for all the damages he sustained by reason of the unlawful acts of the defendant done before suit brought, whether it consisted in reduction of the hay crop in 1885, or injury to the land itself, or both; that the fact that similar acts were continued by the defendant after suit brought might render it more difficult to ascertain the damage resulting from acts done before suit, but would not disentitle plaintiff to recover such damage as he could show resulted from such prior acts; and confined plaintiff to recovery for damages resulting from such acts alone.

Under this ruling, as tending to show what damage to the land resulted from overflow before suit brought, the following testimony of the plaintiff was admitted subject to the defendant's exception.

Q. Taking the stream as you found it during the season and latter part of the season of 1885, and compare it with the stream in 1886, and the effect upon your meadow, or rather the stream and flow of water in it, and the set back of the water, whether it increased, whether there was more in the year 1886 than in 1885? A. More in 1886.

Q. How about the deposit of sand as you examined it and found it in 1886, as compared with 1885? A. I think there is more, because they have kept running it in.

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Q. You said you examined it yourself. As you examined the bed of the stream and looked at it in that way in 1885 and 1886, how did they compare?

A. I think it has been all the while on the gain; the water has raised, and the stream filled up, and caused more stuff to lodge about where the sand comes in, perhaps.

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Q. You may state the condition the meadow was in in the summer of 1886, as affected one way or the other by this water.

A. It has killed out the fine grass, the good quality; there is a place where the water has laid on there so long that it has killed it out entirely, and nothing but polly pods come in. Where the grass stands it is coarse, not fit for anything.

The plaintiff introduced testimony to show that opposite where the defendant discharged its sand into the stream there was a sand-bar or "sand dam," which he claimed obstructed the flow of the stream and was the cause of the flooding of his land. The defendant introduced testimony tending to show, and claimed an obstruction at a point on the stream below all the marble mills, together with the filling up of the channel in the intervening distance, was the cause of setting back the water, and that the current of the stream was the same, above, across and below the sand-bar.

*W. H. Smith*, for the defendant.

All experience has shown, as is well known, that *one year's* flowing of mowing lands works no essential injury. Indeed, for most lands, such flowing is a benefit.

If granted that the ruling as to damages recoverable, and the charge to the jury was correct, it is manifest that the admission of the evidence, to which objection and exception were taken by the defendant, led the jury astray and allowed them to find damages far in excess of what was possible to have been suffered by the plaintiff for the overflowing in the year 1885.

Such damages could be found only by consideration of a

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continued flowing in 1886 and 1887, the trial being at September Term, 1887.

The whole force of the testimony taken by interrogatories and reported here, admitted under objection and exception by defendant, is as to the effect of the flowing since the suit was brought.

*Lawrence & Meldon*, for the plaintiff.

The objection to the evidence was because it tended to show injury to land and crops accruing subsequent to the suit.

The effect upon the crops and land caused by the overflow prior to the suit, was proper to be shown.

Can the defendant object to this because by continuing its wrongful acts which caused the injury, it is thereby rendered more difficult for the plaintiff to draw the line between damage accruing from the wrongful act of defendant committed before and after suit?

Had defendant at the commencement of suit discontinued running its sand into the stream and removed the obstruction it had already caused, clearly, the plaintiff would have been entitled to show the subsequent condition of his meadow as affected by the overflow.

And as bearing upon this, the quality and quantity of hay growing thereon as compared with that produced before the flooding of the meadow was admissible.

The opinion of the court was delivered by

TYLER, J. If the plaintiff was entitled to recover in this action he was entitled to recover for all the injuries to his crops and land that were occasioned by the defendant's unlawful acts committed before the commencement of the suit.

The plaintiff's evidence, as recited in the bill of exceptions, and which was admitted subject to the defendant's objection and exception, clearly, bore upon the question of these injuries and could not be properly excluded although it had a tendency to show some injury caused by similar acts done after the

suit was commenced and for which the plaintiff could not recover in this action.

The plaintiff was not restricted in his right of recovery to the injury to his land in the year 1885. All the effects of the flowage might not have been apparent until the following year, and the evidence in question was admissible as tending to show the full extent of the injury caused by the alleged wrongful act; and in this view it was proper to show by comparison the condition of the meadow in the year 1886 and its condition in the preceding year. It was doubtless a somewhat difficult task for the jury to determine how much of that condition was attributable to the wrongful acts of defendant committed before the bringing of the suit and how much to such acts committed thereafter; but it was the province and the duty of the jury to determine this question and the instructions of the court on this subject seem to have been full and explicit. Certainly, the fact that the defendant continued the wrongful act after the suit was brought, should not operate as a shield to protect it from the full consequences of such act committed previously thereto.

The defendant's counsel requested the court to instruct the jury that, "If the jury find that the sand deposited by the defendant in said river or stream does not interrupt the flow of the water in said stream, and that there is as much current in the stream above the dam as there is below it, then the plaintiff cannot recover damages of the defendant in this action; that the comparative depth of water above and below said dam was not material to the issue in this case." The court refused so to charge, but left it to the jury to decide as a question of fact, upon all the evidence before them, whether or not the bar obstructed the water as complained of. In this there was no error; as it was clearly a question of fact for the jury.

We find no legal error in the trial of the cause in the court below and its judgment is therefore affirmed.

ARCHIE J. WORTHEN, *by next Friend*, v. H. W. LOVE.

*Animals. Vicious Dog. Negligence.*

1. One is not liable for the damages caused by his dog, though he knows that he has a vicious propensity, if he exercises proper care and diligence to secure him so that he will not injure any one, who does not unlawfully provoke or intermeddle with him.
2. In an action to recover for injuries caused by a dog, which the defendant admitted that he knew was vicious, but claimed that he kept him securely chained, evidence was admissible to prove that the defendant knew that the dog broke away and unprovoked bit a child only a short time before the plaintiff was injured,—on the ground that it tended to show that the defendant did not keep the dog securely chained, and to impeach the credibility of the defendant; and this is so although the plaintiff's counsel did not state the object of the evidence, and the court supposed it only bore upon the character of the dog and defendant's knowledge of it.

ACTION on the case to recover for injuries resulting from the bite of a dog. Trial by court, March Term, 1887, TAFT, J., presiding. The court assessed the damages at \$30, but held that the plaintiff was not entitled to recover, and rendered judgment for the defendant. The facts appear in the opinion of the court.

*J. C. Baker*, for the plaintiff.

The defendant with knowledge of the vicious nature of the dog is answerable for the injuries.

The language of LEE, Ch. J., in *Smith v. Pelah*, 2 Strange, 1264, has full application: "That if a dog has once bit a man, and the owner having notice thereof, keeps the dog and lets him go about or lie at his door, an action will lie against him at the suit of a person who is bit, though it happened by such

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person's treading on the dog's toes ; for it is owing to his not hanging the dog on the first notice. And the safety of the King's subjects ought not afterwards to be endangered." *Buckley v. Leonard*, 4 Denio, 500 ; *Godeau v. Blood*, 52 Vt. 251 ; *Hill v. Cox*, 54 Vt. 627.

The keeping of such a dog is wrongful and at the peril of the owner, and therefore the owner is liable to any person injured by such a dog, without any averment or proof of negligence, in securing or taking care of it, and irrespective of any question of negligence of the plaintiff. *Woolf v. Chalker*, 31 Conn. 121.

The offered evidence was clearly admissible to prove that the dog was not securely fastened, and also the defendant's knowledge.

*H. W. Love, pro se.*

The rejected evidence was immaterial. Before a party accepts to the rejection of evidence he should make his offer plain. *Daniels v. Patterson*, 3 N. Y. 47. In reply to the plaintiff's brief, see *Earl v. Van Alstine*, 8 Barb. 630 ; *Scribner v. Kelley*, 38 Barb. 14 ; *Blackman v. Simmons*, 3 C. & P. 138 ; 4 C. & P. 297 ; 1 Esp. 203.

The opinion of the court was delivered by

Ross, J. On the facts found by the County Court, its judgment for the defendant was correct. The owner of a dog known to be vicious, has the right to keep him, if he exercises proper care and diligence to secure him so that he will not injure any one who does not unlawfully provoke, or intermeddle with him. The court has found that the defendant knew the dog was vicious and kept him chained during the day time in his barn, and that he broke away and injured the plaintiff by reason of being unlawfully provoked by the plaintiff, who had no lawful occasion to go to the barn where the dog was chained. Hence, the only question for consideration is whether the court improperly excluded the offered testimony

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of Eugene Alexander. The defendant had conceded that he knew the vicious propensity and character of the dog, and that, ever since he had that knowledge, he had kept him securely chained in his barn during the day time with the barn doors open, but left him unchained in the barn nights with the barn doors securely closed. This testimony tended to show that the defendant had exercised due care and diligence in restraining the dog, and that if he broke away on the occasion of the injury, it was owing solely to the negligence, or unlawful conduct of the plaintiff, in provoking the dog. The rejected testimony of Alexander tended to show that the defendant did not keep the dog securely chained during the day time, but left him so insecurely chained that only a few days before the injury of the plaintiff, the dog when unprovoked, broke away from its fastenings, and injured the witness' young daughter, when passing on the street, and that this was known to the defendant. This offered testimony bore directly upon the care and diligence of the defendant in keeping the dog, and of his knowledge that he was insecurely fastened. It also tended to impeach the credibility of the defendant as a witness. It was therefore admissible. The fact that the court supposed that it only bore upon the character of the dog, and the defendant's knowledge of it,—which had been conceded,—did not without inquiry, or having the purpose for which the testimony was offered, stated, authorize its rejection. *Camp v. Camp*, 59 Vt. 667, is a recent and full authority on this point. As it cannot be known what facts would have been found if this testimony had been admitted, the judgment must be reversed and cause remanded for a new trial.

**WILLIAM E. LLOYD v. R. E. LLOYD AND R. W. JONES.***Damages, Measure of.*

It is the duty of one injured in his estate by the fault of another to use all reasonable means to protect himself against injurious consequences; thus, the defendant obstructed the plaintiff's drain, and the plaintiff could have indemnified himself for \$25.00, but by delaying to repair, the damages amounted to \$100.00; *Held*, that the legal measure of damages was \$25.00.

TRESPASS on the case for obstructing a drain. Heard on a referee's report, September Term, 1887, ROWELL, J., presiding. Judgment for the plaintiff to recover \$100.00 and costs.

It appeared that the parties to this suit occupied and worked under leases certain slate quarries, which were near each other; that there was a natural descent and flow of the surface water from the premises described in the plaintiff's lease on to the premises described in the defendant's lease, and there was no other natural outlet for it; that the quarries were on the same farm, and the plaintiff's lease was executed several years prior to the defendant's, and by its terms he had the "right of draining said quarry." It also appeared, that the plaintiff built a covered underground stone drain from his quarries in the same general direction the water had been accustomed to flow, and had used it for some fifteen years for carrying off the water.

The referee found:

"The defendants also opened quarries on their premises and laid a drain from one of them into this drain of the plaintiff, but on the land of the defendants and extended said covered drain some distance on their premises. And from the outlet of this extension the plaintiff and defendants united and built an open drain for further distance on the defendants' land. And thus both parties in harmony used said drain for draining their respective quarries.



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"About two years ago the defendants desiring to make a new opening at or near the outlet of said drain as it had been built as aforesaid, found it necessary to turn the water from the end of the covered drain in another direction on their premises so that it would not interfere with said new opening.

"They therefore without consulting the plaintiff filled up said open portion of the drain which the parties had built jointly as aforesaid and dug another open drain from the end of the covered drain in a different direction but did not make it as low as the covered drain was at its outlet. At that point the said former open drain had got filled up somewhat by the cattle crossing it and standing about it for a drinking place, and the water coming out of the covered drain rose or boiled above the mouth, more or less and flowed off.

"This filling up had not up to that time so obstructed the drain as to seriously impede its use.

"The substance filled in was probably loose and soft and the water worked through it. As soon as the defendants made this change in that portion of the drain, said covered drain failed to carry off the water from the plaintiff's quarry, as it had previously done and the plaintiff was put to expense and suffered damage.

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"It is impossible to be certain about the underground obstructions and percolations of water. Without attempting to account for the large increase of water in the plaintiff's quarry after said change in the drain by the defendants, we are fully satisfied it did not wholly or in very large degree come from the obstruction made by the defendants, but did somewhat and we find the damage resulting to the plaintiff, therefrom, and not from other causes, was \$100.00.

"We also find that the plaintiff might have gone on and sunk the new drain made by the defendants as aforesaid, below the outlet of the covered drain at an expense not exceeding \$25.00. It did not appear that the defendants objected to his doing so."

*G. M. Fuller and R. C. Abell*, for the defendants.

The drain may be divided into three sections,—the upper end built by the plaintiff; the middle part, built by the defendants; and the open drain built by them jointly. The defendants were under no obligation to keep the middle sec-

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tion open. If the plaintiff is entitled to recover anything, it is only the \$25.00, the cost to secure the required drainage. He is not justified in waiting, and then ask pay for injuries that he could have prevented. *Keyes v. Western Vt. Slate Co.* 34 Vt. 186; *Eureka Marble Co. v. Windsor Manfg Co.* 51 Vt. 170.

*Bromley & Clark and C. H. Joyce*, for the plaintiff.

An action on the case can be maintained by one tenant in common against his co-tenant for a misuse or injury of the common property, but not a total destruction of it. 1 Chit. Pl. 79; *McLellan v. Jennes*, 43 Vt. 183; *Booth v. Adams*, 11 Vt. 156.

The opinion of the court was delivered by

POWERS, J. The plaintiff suffered damage by the wrongful obstruction of his drain. "He might have gone on and sunk the new drain made by the defendants as aforesaid below the outlet of the covered drain at an expense not exceeding \$25," says the referee.

Without taking this precaution he was damaged \$100. Which sum is recoverable upon the facts stated in the report? for it is clear that a liability is established.

The general rule is that a plaintiff, suffering damages by the fault of the defendant, may recover the full amount of his damage. But this rule is modified, if the plaintiff's negligence or misconduct has aggravated or increased such damage.

It is the duty of a person injured by the fault of another to use all reasonable means to protect himself against injurious consequences. If injured in his person he must attend to his cure. If injured in his estate he must attend to its preservation. If he fails in this duty he cannot gather the fruits of his own negligence.

The plaintiff could have indemnified himself at an expense of \$25.00, and this is the legal measure of his damage. *Bardwell v. Jamaica*, 15 Vt. 438.

Judgment reversed and judgment on the report for the plaintiff for \$25.00, and interest from filing of report.

JOHN W. CRAMPTON, ASSIGNEE, v. VALIDO  
MARBLE COMPANY.

*Insolvent Law. Fraud. Demand. Assignee. Damages.  
Practice.*

1. The insolvent law may act upon contracts made in another state by citizens of this State, when all the parties interested are within the jurisdiction of our court; an assignment vests in the assignee all the property, whether in this or another state; and he can recover of a creditor for property situated in another state which he purchased there of the debtor in fraud of the law in payment of his debt.
2. In an action of trover by an assignee against a creditor who purchased the debtor's property in fraud of law, and applied it in payment of his debt, evidence of the price was admissible on the question of damages—not conclusive, but to be considered in connection with the fact that the sale was peculiar, and as tending in some measure to show the value.
3. No demand was necessary.
4. The measure of damages was the value of the property at the time the defendant took it.
5. The court allowed the plaintiff to file a *remittitur*, certain articles having been by inadvertence included in the verdict, which were not taken by the defendant, and rendered judgment for the balance.

TRESPASS on the case and trover. Trial by jury, March Term, 1887, TAFT, J., presiding. Verdict for the plaintiff to recover \$1,548.11, made up as follows: Pair of oxen, \$162.76; one dynamo, \$696.47; marble purchased at West Rutland, Vt., \$260.28; marble purchased at Salem, N. Y., \$428.60.

The evidence for the plaintiff tended to show that the West Rutland Marble Company was a Vermont corporation operating a marble quarry in West Rutland, in the State of Vermont, and two marble mills, one at West Rutland and the

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other at Salem, in the State of New York; that Dr. Nelson was the president of said company, and resided at Rutland, in this State, and that the establishment at West Rutland was in charge of one Barnum, and the establishment at Salem was in charge of one Thomas; that the Valido Marble Company was a corporation under the laws of the State of Vermont, carrying on a marble mill and business in the town of Fair Haven, in this State; that in the month of January, 1886, the West Rutland Marble Company owed the defendant the sum of about \$1,630, and was insolvent; that on the 6th day of January, 1886, Guy H. Reynolds, treasurer of the defendant company, saw the said Nelson, and afterwards, on the same day, went to West Rutland and represented to Barnum that he had purchased of Nelson, as such president, one dynamo, an electrical machine, then in use at the establishment at West Rutland, for the sum of \$1,100, to be applied in reduction of defendant's said claim against the West Rutland Marble Company, and that Barnum, knowing the company to be desirous of selling said dynamo at that price, delivered the same to said Reynolds, who took it away; that at the same time said Reynolds purchased of Barnum, as agent of said company, one yoke of oxen at the price of four and one half cents per pound, live weight, and five car loads of marble, all to be applied upon the same indebtedness; that said oxen and two car loads of the marble were delivered, but that the delivery of the rest of the marble was prevented by the legal proceedings hereafter mentioned; that it was agreed that the price of said marble should be according to grade, and at the list, or usual market prices for the different grades, less the customary wholesale discount which was allowed the defendant, as a wholesale dealer; and that the price of the marble contained in the two car loads, so taken by said defendant, as then graded, and after taking out the discount, was \$280.37; that on the next day said Reynolds went to Salem and purchased of said Thomas, as agent of the West Rutland Marble Company, three car loads of the marble which had been sawed out at the Salem

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mill, and which, at the time, was in the yard connected therewith, and which he selected, and which was graded by Thomas, and loaded by the men employed at said mill, who were paid therefor by the defendant; that said Reynolds directed said marble to be shipped to said Fair Haven, where the said West Rutland marble had also been shipped, and paid the freight thereon; that the price of the marble was fixed in the same manner as that of the West Rutland marble, and amounted to \$512.06.

The plaintiff also offered evidence tending to show that said dynamo was taken by cars to Fair Haven, where it lay for some days in the freight depot, whence it was taken into the State of New York, where it remained for several months, and until after the commencement of this suit; that the said oxen, at some time in the month of January, 1886, were sold and killed; that said marble, or a part of it, and whether that from West Rutland or Salem did not appear, was taken into the State of New York without having been unloaded, but was returned to Fair Haven, where said five car loads were unloaded and placed among other marble in said defendant's yard, and that sales were made therefrom to the amount of about \$75, and that the rest was still on hand; that the understanding between the defendant and the West Rutland Marble Company was that all said purchases were to be applied to the liquidation of defendant's claim against the West Rutland Marble Company, or so much thereof as would be necessary for the payment of the same.

For the purpose of showing the value of said property the plaintiff offered evidence to show the price which the West Rutland Marble Company sold the property for to the defendant, and the same was admitted not as conclusive, but to be considered with the other evidence in the case, and in connection with the fact that it was taken upon a demand against the vendors of the property. This was admitted against the objection of the defendant, and exception was seasonably taken. The counsel for the plaintiff did not claim that the sums

agreed to be paid for the property were, as matter of law, conclusive as to the values, but urged in argument that as defendant had agreed to allow those prices at the time of the sale, they ought, in fact, to be taken at the trial as the true values for which defendant should be held liable.

The plaintiff's evidence further tended to show that on the 6th day of January, 1886, a petition in insolvency against said West Rutland Marble Company was filed in the Court of Insolvency for the District of Rutland; that such proceedings were had that said company was duly adjudged an insolvent January, 1886; that plaintiff was duly appointed assignee February, 1886, and on February, 1886, all property of said insolvent debtor was duly assigned to plaintiff as such assignee, all pursuant to said Vermont insolvency statutes.

The defendant conceded that on the 6th and 7th days of January, 1886, the West Rutland Marble Company was insolvent, and that the defendant's officers had reasonable cause to believe said company to be insolvent, and made no question but the sales to defendant, so far as they took place in Vermont, were preferences in fraud of the insolvency laws of the State of Vermont, within the meaning of sections 1860 and 1861 of the Revised Laws of Vermont, nor that the said transaction at Salem was of the same character with the sales at West Rutland, except that being out of the State, defendant claimed that the same could not be affected by the said laws of Vermont.

Defendant claimed that plaintiff had not shown any such demand by him and refusal by defendant to return said property, as would enable him to maintain this action.

*Lawrence & Meldon*, for the plaintiff.

No demand was necessary. *Larkin v. Hapgood*, 56 Vt. 597; 2 Allen, 24. The defendant was a wrong-doer. The assignee could recover the property or its value. The evidence of the agreed price was admissible. As to the Salem marble, resident citizens of this State cannot, by merely step-

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ping across its boundary line, make contracts and transfer property in fraud of the laws of this State, and of creditors of one or the other of the parties, and then return with the property and hold it in defiance of the laws. 3 Gray, 551; 7 U. S. Dig. 578; *Gardner v. Lewis*, 7 Gill (Md.) 377; 4 Johns. Ch. 485; *Merrick's Estate*, 5 Watts & Serg. 9; *Smith v. Brown*, 43 N. H. 44; 21 N. H. 106; 14 N. H. 38.

Personal property has no *situs*, but follows that of the owner, and the assignment would have vested the property in the assignee had it not thus been fraudulently turned out to the defendant. Cases, *supra*.

C. H. Joyce and H. A. Harman, for the defendant.

A state insolvent law cannot affect a sale of chattels, situated, contracted for, and delivered in another state where there is no such law. The title to this marble completely vested in the defendant. *Burrows v. Whittaker*, 71 N. Y. 291. No assignment of the owner's property had been made.

The right of a debtor, however insolvent, to apply his property in payment of his debts in his own order, is perfectly well settled. *Spring v. So. Car. Ins. Co.* 8 Wheat. 268; *Dudley v. Danforth*, 61 N. Y. 626; *Lyon v. Rood*, 12 Vt. 33.

The Constitution of the United States provides that no state shall pass any law impairing the obligation of contracts. Early in our national judicial history certain principles were laid down as to the relation of insolvency laws to that prohibition. States may pass insolvency laws, when Congress has not put a bankrupt law in force, provided that such laws do not impair the obligation of contracts. *Sturges v. Crowninshield*, 4 Wheat. 122; *Ogden v. Saunders*, 12 Wheat. 213; *McMillan v. McNeill*, 4 Wheat. 209; *Fletcher v. Peck*, 6 Cranch, 87.

The assignment would not be respected in the courts of New York. *Kelly v. Crapo*, 45 N. Y. 86.

This court has often recognized the right of our citizens to go into other states, and there to make contracts of sale which

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could not have been enforced if made here; yet which were adjured to be valid as to our laws, because valid under the laws of the place where made. Thus, to make sales of intoxicating liquor: *Gaylord v. Soragen*, 32 Vt. 110; *Aiken v. Blaisdell*, 41 Vt. 655; sales on Sunday: *Adams v. Gay*, 19 Vt. 358; chattel mortgage: 57 Vt. 360.

Contracts of marriage between citizens of a state by whose laws they are absolutely forbidden, are held valid by the court of the same state, when lawfully celebrated elsewhere, and although the parties went there merely to evade the law. *Van Voorhis v. Brintnall*, 86 N. Y. 18; *Thorp v. Thorp*, 90 N. Y. 602; *Morse v. Hegemen*, 91 N. Y. 521.

Against this law, can only be urged the principle that the State may compel its own citizens to refrain from doing beyond its limits some things which the local law would avoid, if done within its limits. *Still v. Worsewick*, 1 H. Bl. 665; *Hunter v. Potts*, 4 T. R. 182; *Dehon v. Foster*, 7 Allen, 57. But this doctrine meets with these vital limitations: (1.) It could not affect this case to concede that our courts may enjoin our citizens from prosecuting actions, valid by the laws of the states where pending, for putting in motion the legal process of another state does not create a *contract* protected by the National Constitution; (2.) English precedents are not in point; for no constitution protects contracts against the action of Parliament; (3.) The right of the bankrupt's chose in action is not concerned. Here personal chattels, beyond the jurisdiction of the court, were sold by an executed and lawful contract. 4 Johns. Ch. 460; 14 N. H. 38; 21 N. H. 106; 43 N. H. 44. The price at which the defendant agreed to take the property, under the circumstances, was not competent evidence of the money value of the articles.

The position that a particular sale to become evidence of value, should be fair, actual, and without unnatural advantages on either side, finds support in authority. *Campbell v. Woodbridge*, 20 N. Y. 499; *Gill v. McNamee*, 42 N. Y. 44; *Knickerbocker L. J. Co. v. Nelson*, 78 N. Y. 137.



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Evidence of value, too remote to be admissible, is not a thing to be considered by the jury in their discretion, but it is incompetent, and if received will vitiate the verdict. *Noyes v. Fitzgerald*, 55 Vt. 49.

A demand of the chattels was a condition precedent.

The sale is valid to all the world except the assignee. It is not, therefore, void, but voidable. *Snow v. Long*, 2 Allen, 18.

A preference under sections 1860-61, is not *malum in se*. The purchaser does not become, by relation back, a trespasser for having taken the goods. *Bailey v. Bunning*, 1 Levinz, 172; *Lechmere v. Thoroughgood*, 1 Shower, 12; *Cooper v. Chitty*, 1 Burr. 20; *Smith v. Miles*, 1 Term, 480; *Schuman v. Fleckenstein*, 15 N. B. Reg. 224; *Nixon v. Jenkins*, 2 H. Bl. 135.

The opinion of the court was delivered by

VEAZEY, J. One important question in this case is whether the assignee in insolvency became invested under the assignment with the same right to recover the value of the marble that was in Salem, New York, as though that marble had been in Vermont when the defendant took it. It is insisted by the defendant's counsel that the contract as to that marble between the two marble companies, being valid in New York where it was made, the insolvency law of this State cannot "reach to the impairing or avoiding of that contract." Section 1820, R. L., provides: "An assignment under order of a court of insolvency shall vest in the assignee all the property of the debtor, real and personal, which he could have lawfully sold, assigned or conveyed, \* \* \*. And the assignment shall by operation of law relate back to the date of the filing of the petition." \* \* \* Section 1860, R. L., pronounces a transfer like the one in question "void" and gives to the assignee the right to "recover the property or the value thereof from the person so receiving, or so to be benefitted thereby."

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The contention in this case raises the old question whether an assignment in bankruptcy operates as a complete and valid transfer of all the bankrupt's movable property in other jurisdictions as well as at home; and thus give the assignee the same rights against purchasers and attaching creditors, in the one case as the other.

This question and the question as to the effect of a discharge upon non-resident or foreign creditors who have not submitted to the jurisdiction of the bankruptcy court, have received the most careful consideration of English and American courts and of the ablest legal authors of both countries.

The opinions in some American cases contain a review and discussion of all the authorities; as in *Ogden v. Saunders*, 12 Wheat, 213; *Cook v. Moffat*, 5 How. 295; *Marsh v. Putnam*, 69 Mass. (3 Gray) 551.

The courts of England maintain the doctrine of the universal operation of an assignment upon all movable property, wherever situated at the time of the assignment. The courts of this country are divided on the question, but the weight of American authority is considered to be in favor of confining the operation of such assignment to the state where the party is declared bankrupt or insolvent. The discussion of this vexed question has been so exhaustive, it would be but repetition to again review the cases, or to present the course of reasoning that has led the most eminent jurists to opposite results.

On examination of the cases of the United States Supreme Court, where naturally questions growing out of bankruptcy and insolvency laws would receive the most searching investigation, it will be found that the case at bar, so far as the decisions of that court are concerned, is a new one. The parties in this case are both residents of this State. The debtor company owned a marble quarry and mill in this State and another mill in Salem, New York, where some of its marble was sawed. On the day the petition in insolvency was filed, the treasurer of the creditor company, this defendant, took a transfer of certain marble and other property at the

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debtor's mill in this State, to apply on its debt, then having reasonable cause to believe the debtor was insolvent; and the next day he went to Salem and for a like purpose took a like transfer of some of the marble there, and brought it back to his company's premises in this State.

The defendant stands solely on the fact that the contract for the Salem marble was made in New York. No court of that state has intervened. No special law of that state is invoked. No non-resident complains. The controversy is not between residents of different states, nor as to a debt created prior to the enactment of the insolvency law, nor as to the effect of the action of a court in another jurisdiction, touching the same matter. The difference between this case and those in the Federal and Massachusetts reports, is well pointed out in *Marsh v. Putman*, 69 Mass. (3 Gray), 551.

In many of the cases the contention has been between residents of different states. It was so in *Ogden v. Saunders*, *supra*, and the question was whether a discharge of a debtor was valid against a creditor who was a citizen of another state. It was decided in the negative. But in the opinion of Justice JOHNSON he says: "As between its own citizens, what ever be the origin of the contract, there is now no question to be made on the effect of such a discharge." It is to be noted that the court is here invoked to administer a law of this State between its own resident citizens. A quotation from the opinion of Chief Justice TANEY in *Cook v. Moffat*, *supra*, is pertinent and, as it seems to me sound: "According to established principles of jurisprudence such (insolvent) laws have always been held valid and binding within the territorial limits of the state by which they are passed, although they may act upon contracts made in another country, or upon the citizens of another nation; and they have never been considered, on that account, as an infringement upon the rights of other nations or their citizens. But beyond the limits of the state they have no force, except such as may be given to them by comity. \* \* But how far this comity should be extended would be exclu-

sively a question for each state to decide for itself, by its own proper tribunal." This is but stating in substance that states may pass laws having effect within their respective limits, and binding their own courts, leaving the effect in other states to be determined by their own tribunal. If this assignee were seeking this remedy in New York then the question of comity would arise. It would be for the court there to say whether, upon the ground of comity, it would enforce a plain statutory remedy of this State as against a contract executed in that state between citizens of this State.

In *Marsh v. Putnam*, *supra*, it was held that a certificate of discharge under the insolvent law of Massachusetts is a bar to an action on a contract between two citizens of that state, though made and to be performed in another state.

In *Gardner v. Lewis*, 7 Gill's Rep. (Md.) 377, the action was trover under a statute like ours, and upon similar facts, and the court in a rigorous and learned opinion sustained the plaintiff's right of recovery; holding that their courts were bound to observe and enforce the statutory provisions of their own state, and that a nation will not suffer its own citizens to evade the operation of its own fundamental policy or laws, or to commit fraud, in violation of them, by any acts or contracts made, with that design, in a foreign country, and it will judge for itself how far it will adopt, or how far it will reject, any such act or contracts. We think this is a sound as well as wholesome view of the law. Chief Justice MARSHALL, in the case of *Ogden v. Saunders*, *supra*, said: "It is a general rule expressly recognized by the court in *Sturges v. Crowninshield*, that the positive authority of a decision is co-extensive only with the facts on which it is made. Subjecting all the reported insolvency cases to this rule I think there is no one in conflict with the two cases last cited from Massachusetts and Maryland. We therefore consider that it is the right and duty of this court to enforce the statute according to its plain terms, and to hold that the defendant company shall not escape liability for an act in fraud of our

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laws upon the plea that it occurred beyond the line of the State.

For the purpose of showing the value of the property taken by the defendant, the plaintiff offered to show the price for which the West Rutland Company sold the property to the defendant, and the same was admitted not as conclusive, but to be considered with the other evidence in the case, and in connection with the fact that it was taken upon a demand against the vendor of the property. To the admission of this evidence the defendant excepted. We hold that the evidence was admissible, to be considered as indicated in the ruling. Price generally, if not always, has more or less reference to value. It must therefore tend in some measure to show value. Its weight is dependent upon the circumstances of the sale. If the sale is usual in all respects, the price would tend more strongly to show actual value than if the sale is peculiar as in this case; but it cannot be said that, because it is peculiar, it has no relation to the value. It is hardly conceivable that buyers and sellers should not have value in mind in fixing price. Price cannot in any case be conclusive of value. Yet it is concededly competent to show price as bearing on value in some cases. Where is the line to be drawn? It would seem to be better to admit the evidence of price in all cases together with the circumstances of the sale, and let the evidence be guarded by proper instructions.

It is further claimed that the plaintiff cannot recover because no sufficient demand for the return of the property was shown. We think no demand was necessary to entitle the plaintiff to recover.

The contract by which the defendant obtained the property was by the statute *void*. The defendant appropriated the property to its use by a sale and otherwise. There was concededly an actual conversion and no power to restore. The harsh rule was early established in this State, unlike the rule in some other states, that where one purchases personal property of a person in possession of it, but who is not the true

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owner and has no right to sell it, and the purchaser takes possession, claiming title to it as owner, and puts it to use, this is an actual conversion and makes him liable in trover to the owner, without any demand or notice, though he purchased in good faith of one whom he supposed to be the owner and entitled to sell it. *Riford v. Montgomery*, 7 Vt. 411.

The case at bar is stronger because here the vendor not only had no right to sell the property to the vendee, to be applied on the debt, thereby giving a preference, but the vendee was chargeable with knowledge of that fact. There is no necessity of proof of a demand and refusal for the purpose of establishing a conversion, when the conversion is otherwise established. It is only evidence of a conversion where the party might have delivered the property if he would. Roberts Dig. p. 709. Defendant's counsel cites *Schuman, Assignee, v. Fleckenstein*, 15 N. B. R. 224. That action was brought by the assignee of a bankrupt under the U. S. Bankrupt Act (sec. 5128 of the U. S. R. S.) to recover from the defendant the sum of \$311, the alleged value of certain property transferred by the bankrupt to the defendant within two months prior to the filing of the petition against him in bankruptcy, contrary to the provision of said action, which is in substance and almost in terms the same as section 1860 of our Revised Laws. The defendant demurred and for causes of demurrer assigned that the complaint, a code proceeding, did not allege a demand and refusal of the property, *or any fact showing its conversion by the defendant*.

The court sustained the demurrer, holding that an action to recover the value of property can only be maintained when the property itself has been actually or constructively converted to the use of the defendant, and the complaint must therefore allege a conversion in terms or its legal equivalent, a demand and refusal. Under that decision either is sufficient.

Here we have a conversion in fact. Speaking of the action of trover, Chitty (Chit. Pl. page 170) puts it in the same way: "A demand and refusal are necessary in all cases when the defendant became in the first instance lawfully possessed of the

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goods ; and the plaintiff is not prepared to prove some distinct actual conversion." So in *Triscony v. Orr*, 49 Cal. 617, it was held that no distinct and actual conversion being shown, the plaintiff must allege and prove a demand and refusal before he can recover. To the same effect see also *Brooks v. McCracken*, 10 N. B. R., 466. The proof of demand and refusal constitutes evidence of conversion, or constructive conversion as sometimes called, and is the equivalent of proof of actual conversion, either of which is sufficient to entitle the plaintiff to recover, where the other elements are established. See *Tapley v. Forbes*, 84 Mass. 20 ; *Larkin v. Hapgood*, 56 Vt. 597.

We think there was no error in the instructions to the jury as to the rule of damages. It was the value of the property at the time the defendant took it. If the clause that the plaintiff was entitled to recover the value of the dynamo as it stood in the mill was fairly and clearly referable to the damage done to the insolvent's other property not taken by the defendant, it would doubtless be error ; but we do not so construe it or think it was so understood by the jury. But we do think that the jury by inadvertence included in the special verdict as to the dynamo, the three electric lamps and the cost of setting them up. The correspondence in the figures makes this very apparent. The amount of this with interest was \$171.47. This the plaintiff offers to remit, and asks leave to file a *remittitur*. This, we think, should be allowed, but the defendant should have costs in this court. Judgment is rendered for the plaintiff for the amount of the judgment below less said sum remitted, with costs, less the defendant's costs in this court.

## ADDISON COUNTY, JANUARY TERM, 1888.

Present: ROYCE, Ch. J., ROSS, POWERS and VEAZEY, JJ.

## STATE v. JOHN C. FLINT.

*Criminal Law. Practice. Evidence.*

1. It was not error to allow counsel for the State to ask jurors whether they would disregard the testimony of an accomplice.
2. The order in which peremptory challenges shall be exercised rests in the discretion of the trial court.
3. There is an exception to the rule, that proof of declarations made by a witness out of court is not admissible in corroboration of his testimony; namely, when an attempt is made to discredit a witness on the ground that he is under the influence of some motive to make a false statement in consequence of his relation to the party or to the cause, it is proper to show that he made a similar statement before the relation existed.
4. ACCOMPLICE. Where an accomplice testified in the court of examination, just after the crime had been committed, to a conversation had with the respondent just before it had been committed, and also testified to the same conversation in the court below, and the respondent claimed that he had made up his story from information derived from some late source, it was held, that the accomplice's testimony, given at the preliminary hearing, was admissible, not in corroboration, but as tending to show that he had previous knowledge.
5. But where it was claimed that a witness had become confused and led into making contradictory statements on re-cross-examination, proof was not admissible to show that his testimony given at a former trial was the same as that given in his examination in chief at the last one.
6. It being important to determine how much time was required for a man to travel the distance between a certain hotel and the place where the crime was committed, testimony relating to this question, given by those who passed over it for the purpose of being witnesses, was admissible. Dissimilarity in conditions would only go to its weight.
7. Evidence of the notoriety of a crime is admissible to prove that the respondent knew of it at a time when he claimed that he had not heard of it; but if incompetent it would become harmless on failure of the attempt to show such fact.



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8. The evidence in behalf of the State tended to show that the respondent eluded his bail; the respondent, to rebut the presumption of guilt arising from concealment, used his bail as a witness, who testified that he advised him to go away to escape a civil suit for damages, and that he then *believed* he would come back; *Held*, that it was not legal error to allow the inquiry on cross-examination as to what he *thought* about his coming back after he, the bail, had got a bench warrant for him.
9. OFFICER. The fact that an officer having charge of the jury in a case in which he was a witness, was present during their deliberations after it had been submitted to them, is not sufficient cause for setting aside a verdict, although it was an impropriety, and another officer ought to have been selected.

INDICTMENT for burglary. Trial by jury, June Term, 1887, ROWELL, J., presiding. Verdict, guilty. Exceptions by the respondent.

The State's evidence tended to show that the respondent, who lived in Hancock village, at a distance of 66 rods from the hotel, and one Charles Blair, who lived about one mile from said hotel, and who was a witness on the part of the State, on Friday, June 6, 1884, spent a considerable portion of the day together fishing in the stream which runs through said village, and while so fishing partially planned the crime upon which the indictment is founded; that during the evening of the same day they met at the hotel in the centre of said village and consummated the arrangement for the commission of the crime; that respondent then left Blair at the hotel, went to the post office, 30 rods distant, where he found Jennie D. Whitton, whom he accompanied to the house of one Lewis, 141 rods distant from said hotel, and then returned to the hotel and rejoined Blair; that soon afterwards, about 10 P. M., they started out to commit the crime; that the route pursued by them was indicated by a red dotted line upon the map used on the trial; that upon starting out from the hotel respondent went around the west end of the hotel and Blair the east end, up the road towards Granville, to where the Blair road, so called, intersects the Granville road, then up the Blair road to a certain butternut tree, near which he met respondent; that from said tree they went by the nearest course to the house of James Welch, distant from the hotel, by the route aforesaid, 396 rods, where the burglary was committed; that Welch was

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eighty years of age, living alone, and when found by respondent and Blair was abed with his pants on, in which was a wallet containing \$90 in bank bills and some promissory notes; that Welch was throttled and the wallet taken from his pocket; that they retraced their route as far as the butternut tree, where they separated, Blair going up the Blair road to his house, where he arrived at about 11.40 P. M., and respondent going down the Blair road and Granville road past the hotel aforesaid, where he appeared at about 11 P. M.; that the night was light, the moon shining, obscured somewhat by light scattering clouds; that on their way to Welch's they stopped to tie on some cloth masks, and on their return to find a shoe lost off by Blair in his haste to get away, and to divide the money which they had stolen.

That respondent and Blair were arrested on Tuesday morning following the commission of the crime, and the examination before the justice was held on the following Thursday. The case was tried at the December Term, 1885, and again at the December Term, 1886, upon both of which trials Blair was improved by the State as a witness respecting all matters connected with the crime, and he was in like manner improved on this trial.

Before the introduction of any evidence the respondent's counsel claimed, in his opening statement to the jury, that respondent left said hotel at about 9.30 P. M. the night of the robbery, went to said post-office, and from there with said Whitton to said Lewis', leaving the latter place at about the time the clock in Lewis' house struck ten, and went leisurely home, where he arrived at about 10.30, and was up stairs and in bed at 11 P. M.; that it would appear that, by the account of the transaction by Blair upon former trials as to the time when they left the hotel and the time when Blair arrived home, and the time when the State claimed that the respondent was seen passing the hotel on his return from Welch's the time was too limited to permit of their going, committing the crime and returning.

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The first exception is sufficiently stated in the opinion.

As to the second exception, the respondent requested that the State be required to exercise both its peremptory challenges, before he was required to exercise any ; but the court ruled that the State should exercise only one peremptory challenge at first, and that the respondent should then exercise three peremptory challenges, before the State exercised its second peremptory challenge, and the respondent his other three afterwards. Thereupon the State exercised its first peremptory challenge and the panel was filled ; then the respondent exercised two peremptory challenges, and the panel being filled he said that he did not desire to exercise any further peremptory challenges, as the panel then stood. The State then exercised another peremptory challenge and the panel was filled. As some of the jurymen were out deliberating upon their verdict in another case, this exhausted all the regular jurors in attendance upon court ; and the respondent's counsel then stated that he should have challenged one more of the panel, as it then stood, peremptorily, but that all the regular jurors for the term having been drawn it would necessitate the taking of a talesman, and he therefore declined to make use of any further peremptory challenges.

As to the third exception, it appeared, that the State improved the said Whitton as a witness, who gave material testimony as to the hour when the respondent left her, as aforesaid, at the Lewis house, to the effect that the clock struck ten about five minutes after he left her ; and that the witness identified four letters, as having been written to her by the respondent in the month of June, 1884, while he was in jail.

Upon cross-examination, with a view to impeach the witness, the respondent's counsel drew out the following facts, viz., that the witness was summoned and improved as a witness by the respondent at the trial of this cause at the December Term, 1885, and again summoned by respondent to the trial at the December Term, 1886, but then improved by the State as a witness ; that at said last named term, upon Saturday, she was

brought to Middlebury by said Blair, and the trial began the following Monday; that she had retained said letters in her possession until the Saturday aforesaid, when she gave them, upon his demand, to the state's attorney; that she remained at the Addison House over Sunday with Blair and his wife, and was in Blair's company a considerable portion of the time during the trial, while taking their meals and at other times, and in their room at the hotel more or less; that upon cross-examinations by the State on the first trial in December, 1885, she had testified that she corresponded with respondent while in jail as aforesaid.

For the purpose of sustaining the witness against the impeachment resulting from the cross-examination, in respect of her intimacy with Blair and his imputed influence over her, prompting her to falsify, the State, against respondent's objection, was permitted to show in its opening that at the December Term, 1885, she upon direct examination by respondent gave substantially the same testimony as to the time when the clock struck at Lewis' house with reference to the time respondent left her on the night of the burglary, as she gave upon this trial.

The fourth exception: For the purpose of showing how long it would take to travel the distance from the hotel by way of said butternut tree to Welch's and to return to said tree and thence by the Blair road to Blair's house, the State was permitted to show by one Jones, who walked without stopping over substantially the same route from the hotel to Welch's house and thence back to the butternut tree as the State's evidence tended to show was travelled by respondent as aforesaid on the night of June 6th, 1884, and from said tree by the Blair road to Blair's house, how long it took him to do so; also by a deputy sheriff, Olin A. Smith, hereinafter referred to, and R. E. Dunham, who walked together without stopping over the same course in the day-time while the trial was in progress, how long it took them to do so. Jones, Smith and Dunham performed this journey at the instance of the State

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and for the purpose of giving testimony in the cause. It appeared that part of the way thus walked over was through woods and on a side hill, and was more or less rough and stony, and that there was no path in which to walk. And it did not appear that these witnesses had any previous knowledge of the route Blair claimed to have followed in going from the butternut tree to Welch's and in returning to the tree.

Their testimony tended to show that no one acquainted with the route ever pointed it out to them on the spot, but that their knowledge of it was derived from description by those acquainted with it, and that they followed as near as they could.

The fifth exception : Blair, in his direct examination, testified that while on the fishing ground as aforesaid respondent told him that he could make some masks to wear while committing the crime out of some black pieces of cloth that his mother had in a trunk up stairs in respondent's room, and that such masks were furnished by respondent and used by them in the commission of the crime.

The respondent denied having had any talk with Blair when fishing about robbing Welch, and claimed that the fact that the officers found pieces of black cloth in a trunk as aforesaid might have been, and probably was communicated to him before he testified before the justice, and that this was how he came to know anything about black cloth.

The State was then permitted, against respondent's objection, to show that Blair's testimony before the justice, at said court of examination, respecting the conversation with respondent on the fishing ground about the making of the masks from the black pieces of cloth as aforesaid, was the same as upon the trial. To the admission of this evidence the respondent excepted.

As to the sixth exception, it appeared that on the Sunday following the commission of the crime, the respondent told one Kidder that he did not hear of the crime until the night before about four o'clock.

The State sought to show that the commission of the crime had become so notorious in the community there before four o'clock, Saturday, that the respondent must have heard of it before, and so falsified when he said he did not.

The State therefore called upon one Marsh, as a witness, who was the grand juror who signed the complaint to the justice, and asked the following questions, viz. :

Q. How notorious Saturday afternoon in Hancock village was the fact of the robbery of Welch? A. It wasn't notorious enough so that I heard of it until about two or three o'clock or after.

Q. To what extent was it talked about at that time? A. Well, I found that they pretty much all knew it around the village.

The seventh exception was waived.

As to the eighth exception, it appeared that the respondent improved one Kill as a witness, who on the re-cross-examination made various statements tending to contradict his former testimony given in this trial; that he testified at the former trial of this cause at the December Term, 1886; and the respondent offered to show that Kill's testimony given at that time was the same as that given upon this trial in his examination in chief. The court refused the evidence.

As to the ninth exception, it appeared that the State's evidence tended to show that the respondent eluded his bail and remained in concealment during the June Term, 1885, when he was indicted and wanted for trial. For the purpose of rebutting the presumption of guilt arising from his escape, one Vinton, who was his bail, was used by him as a witness.

The tenth exception stated that the respondent filed a motion to set aside the verdict on the ground that said Sheriff Smith, who had been an important witness for the State, was constantly in the same room with the jurors during their deliberations after they had been charged, until they had agreed upon their verdict.

The court found that said Smith was in constant attendance

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upon the jury during their deliberations. The other facts are sufficiently stated in the opinion.

*Henry Ballard*, for the respondent.

1. The question put to the jurors called for a public expression of their opinion as to the weight they would give to the testimony of the most important witness for the State. The answer practically committed the jurors to decide in advance before they had seen the witness. A similar question might as well be put as to any other witness. There is the same reason why such an expression of opinion as to a witness should disqualify, as an expression of opinion as to the merits of the case. *Boardman v. Wood*, 3 Vt. 574.

2. The ruling of the court as to peremptory challenges was erroneous. It practically denied to the respondent one challenge. "The respondent has always been allowed to use his peremptory challenges as he should find occasion in the process of making the panel." BENNETT, J., *State v. Fuller*, 39 Vt. 74.

It may be made at any time before the jurors are sworn. *Hooker v. State*, 4 Ohio, 348; 1 Bish. Crim. Proc. A respondent is not obliged to take a talesman, except in certain cases. *Hildreth v. Troy*, 101 N. Y. 234; 2 Cen. Reporter, 275; 1 Bish. Crim. Proc. 554.

3. The testimony of the witness Whitton given at the former trial was not admissible. It was offered and introduced generally without any limitation as to its effect. The cross-examination was proper; it did not impeach the witness; but simply showed that she had been more or less intimate with Blair, a state witness; and it had no tendency to show an improper intimacy. *Adams v. Thornton*, 3 South. Rep. (1887); *Munson v. Hastings*, 12 Vt. 346; 17 Mich. 435; 45 N. Y. 577; 13 Vt. 209. Former declarations are never admissible, except where it is claimed that the testimony of the witness is of recent fabrication; or that the witness is testifying corruptly from some cause that has arisen since the

declarations were made. And then such evidence is received with a limitation as to its effect. *Clever v. Hillbury*, 9 At. Rep. 647; 1 Whar. Ev. 570; *Zell v. Commonwealth*, 94 Penn. St. 273. But a witness can be corroborated by his previous declarations only when some independent evidence has been introduced to impeach him, and not because of an impeachment resulting from a cross-examination. Stark. Ev. (9th ed.) 224; *Coffin v. Anderson*, 4 Blackf. 395; *State v. George*, 8 Ired. 324; *Dossett v. Miller*, 3 Sneed, 72.

4. The testimony of Jones, Dunham and Smith was not admissible. The experiments were made under conditions and circumstances so dissimilar in all respects as to raise a multitude of collateral questions, which would mislead the jury. It was not shown that these witnesses went at the same rate of speed or over the same route that Blair did. *Haynes v. Burlington*, 38 Vt. 363; *Branch v. Libbey*, 78 Me. 221; s. c. 57 Am. Rep. 810.

5. The allowing of Blair's former testimony was error. It was simply put in twice for the purpose of showing that it was the same at both trials. There was no suggested limitation as to its effect. There was no claimed impeachment of the witness.

6. Evidence as to the notoriety of the crime ought not to have been admitted. If ever admissible, the margin of time, upon which to predicate the fact, was too small. Ninety-nine persons might have heard of it and the one-hundredth might not, and that one the respondent.

7. If the court was right in admitting the former testimony of the witness Whitton, it was certainly error to exclude that of the witness Kill.

8. It needs no authority or argument to establish the proposition, that what Vinton, the respondent's bail, *thought* was not evidence.

9. The verdict should have been set aside for the cause alleged in the motion. In the case of *People v. Knapp*, 42 Mich. 267 (s. c. 36 Am. Rep. 438), in an elaborate opinion, Judge COOLEY lays down the rule that the presence of an



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officer with the jury during their deliberations, is good ground for setting aside the verdict, even though such officer has not been a witness. *State v. Snyder*, 20 Kan. 306, is to the same effect. Both of these cases are referred to with approval in *Gainey v. People*, 97 Ill. 270; s. c. 37 Am. Rep. 109. What would be said of a verdict where the jury were compelled to deliberate in the presence of all the witnesses?

*Chas. M. Wilds*, for the State.

Bias from peculiar view of the law is good cause for challenge. 1 Bish. Cr. Pr. s. 917; *Commonwealth v. Austin*, 7 Gray 51; *People v. Ah Chung*, 54 Cal. 398; *Gates v. People*, 14 Ill. 433; *Smith v. State*, 55 Ala. 8; *State v. McAfee*, 64 N. C. 339.

Such inquiries made to the jurors on the *voir dire* are important to enable the party to intelligently exercise the peremptory challenges. *Walson v. Whitney*, 23 Cal. 375; *State v. Mann*, 83 Mo. 589; *Monaghan v. Ag. F. Ins. Co.* 53 Mich. 238; *People v. Sar Soy*, 57 Cal. 102; *Lavin v. People*, 69 Ill. 303; *State v. Shields*, 33 La. An. 991.

The order in which the State and respondent shall exercise their respective peremptory challenges is discretionary with the trial judge. *Commonwealth v. Piper*, 120 Mass 185; *State v. Pike*, 49 N. H. 406; *Mfg. Co. v. Canny*, 54 N. H. 314; *Kansas v. Bailey*, 32 Kan. 83; *State v. Hays*, 23 Mo. 287; *State v. Vestal*, 82 N. C. 563; *State v. Vand*, Id. 631.

The rule did not prejudice the respondent. When the jury were sworn, he had four peremptory challenges. *State v. Goffney*, 56 Vt. 451; *State v. Lawler*, 28 Minn. 217; *Hopt v. Utah*, 120 U. S. 430; *Hays v. Mo.* Id. 68.

Under the claim that the witness Whitton had fallen under the influence of Blair, it was proper to prove that she testified on the first trial the same as on the last one. Steph. Dig. Ev. Art. 131 n.; 2 Phil. Ev. 974; 1 Starkie Ev. 221; 2 Russell on Cr. 940; *Robb v. Hackley*, 23 Wend. 50; *Wihe v. Law*, 3 Starke N. P. C. 63; *Durgin and Wife v. Danville*, 47 Vt.

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95; *Com. v. Wilson*, 1 Gray, 340; *State v. Hopkins*, 56 Vt. 263.

The testimony of Jones, Dunham and Smith was admissible. The main and important condition—the distance—was the same in both cases. The dissimilarity in the other conditions goes to the weight, not to the relevancy of the evidence. *BARRETT, J., Walker v. Westfield*, 39 Vt. 246; *Kent v. Lincoln*, 32 Vt. 591; *Darling v. Westmoreland*, 52 N. H. 401; *Com. v. Piper*, 120 Mass 185.

It was clearly competent to show that the accomplice had knowledge of the black pieces of cloth when he testified in the court of examination, and that he demonstrated such knowledge at that time. It was also proper to show the notoriety of the crime. The attempt was not successful and did not prejudice the respondent.

The declarations of the witness Kill are clearly within the general rule. *Munson v. Hastings*, 12 Vt. 346.

The presence of the officer in the jury room, while the jury were deliberating upon their verdict, was not prejudicial to the respondent. *State v. Hopkins*, 56 Vt. 263; *Crockett v. State*, 52 Wis. 211; *Gainey v. People*, 97 Ill. 271; *State v. Hopper*, 71 Mo. 425; *State v. Caulfield*, 23 La. An. 148; *Slaughter v. State*, 24 Texas, 410; *People v. Hartung*, 4 Parker, Cr. C. 316; *Commonwealth v. Shields*, 2 Bush. 8.

That the officer was a witness does not alter the case unless the respondent shows that it prejudiced his right to a fair and impartial trial. *State v. Lockwood*, 58 Vt. 378; *People v. Coughlin*, Mich. 9 W. Rep. 129; *Dunbar v. Parks*, 2 Tyler, 217.

The opinion of the court was delivered by

VEAZEY, J. I. Respondent's counsel insist that it was error for the court to allow the counsel for the State to ask the jurors whether the fact, that a witness produced by the State who participated in the commission of the crime for which the respondent was on trial, would cause them to disregard such witness' testimony.

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It is plain that if a juror had such a settled view of his duty that he would wholly disregard such a witness' testimony on that account, he would not be a suitable man for a juror. It being legal evidence in the case, the trier is bound to regard it. He is not bound to believe any witness. An accomplice's testimony is to be weighed for what it is worth, like that of other witnesses. It may not be believed, but it can not be wholly disregarded.

The propriety of such inquiry must rest largely in the discretion of the trial court. This case illustrates such necessity. It had been tried twice without an agreement; it was known that the State's case depended on the testimony of an accomplice to such an extent that without his testimony a conviction would not be warranted; it is not uncommon to hear men say they would not believe an accomplice in any case. Should a court under such circumstances be powerless to find out whether the jurors were so mentally constituted that they could not try the case according to their oath? We think the ruling was clearly correct.

II. There was no error in the ruling in respect to peremptory challenges. The statute allows six peremptory challenges to the respondent in a criminal case and two to the State, but makes no provision as to the order in which they shall be exercised. In many states this is discretionary with the trial court. See cases in plaintiff's brief. And I apprehend this is the rule to which all courts must come when the order is not regulated by statute. Grave objections will occur to any arbitrary rule, either statutory or judicial. But until an arbitrary rule is made, the ruling must rest in discretion. This is shown in this case. The court below made a rule for the order of challenges in the case, to which exception was taken. We hold there was no error. Why? Not because there is any settled rule regulating the matter pursuant to the order adopted, but because it was fair, and because a respondent can never justly complain of a rule as to the order of peremptory challenges which leaves him a satisfactory panel before his

peremptory challenges are exhausted. Strictly, this court only says that the County Court exercised sound judicial discretion, which is practically saying that the question rests in discretion. I should therefore say so in terms. I believe that the "impartial jury," which the Constitution of the State says the accused person is entitled to, is more likely to be obtained under the rule of discretion than by any arbitrary rule as to the order of peremptory challenges which either the legislature or the courts can make. But this case does not necessarily call for a decision beyond the point that we find no error available to the respondent under this exception.

III. We hold that the ruling was correct under which proof was received as to the testimony of the witness Whitton on one of the former trials.

It is a well established rule that proof of declarations made by a witness out of court in corroboration of testimony given by him at the trial is inadmissible. But with this rule there has come an exception which exactly applies to this case. It is stated in one form by BRONSON, J., in *Robb v. Hackley*, 23 Wend. 50: "If an attempt is made to discredit the witness, on the ground that his testimony is given under the influence of some motive prompting him to make a false and colored statement, the party calling him has been allowed to show, in reply, that the witness made similar declarations at a time when the imputed motive did not exist." In *Greenleaf on Evidence*, sec. 469, the author states the rule thus: "But evidence that he has on other occasions made statements, similar to what he has testified to in the cause, is not admissible; unless where a design to misrepresent is charged upon the witness, in consequence of his relation to the party, or to the cause; in which case, it seems it may be proper to show that he made a similar statement before that relation existed." See also *Stephen's Dig. Law of Ev. Art. 131*, note and cases there cited; 2 Phil. Ev. 445; Bull. N. P. 294; 1 Stark. on Ev. 187, marg. p.; *Conrad v. Griffey*, 11 How (U. S.), 479, Bk. L. ed. 779, note and cases therein cited. The attempted

impeachment here was based on the changed relation of the witness to the party.

IV. The objection to the testimony of Jones, Smith and Dunham, was that it did not appear that they had travelled over this route under the same circumstances and conditions as when travelled over by Blair and his accomplice, whom he charged to be this respondent.

The terminal points were known and the intervening country was described. Blair also testified to the circumstances of the crime and the delays in going and returning. The testimony tended to show the time of departure and return; it was material to know whether the intervening time was adequate. An experiment showing that it was practicable to make the trip in the time would furnish some aid on the point. The distance was the same in both cases; dissimilarity in other conditions would go to the weight of the evidence, but would not render it wholly irrelevant. If the distance had been so great that it could not be accomplished in the time given by Blair, the respondent clearly could have shown that fact by experiment, as it would have weakened, if not nullified, Blair's testimony. Hence the State could show the converse. The exception is not well taken.

V. Without the evidence objected to under the fifth exception the case of the State had this weakness: It could be well claimed, as it was in substance, that Blair's testimony as to what the respondent said to him about making masks from black pieces of cloth in a trunk in his room was made up from information that came to him from some late source, about the officers having found such cloth in a trunk in respondent's room. This was the posture of the case upon the testimony of Blair, the accomplice. The State then proceeded to show that neither the discovery of the black cloth in the trunk, nor anything relating to it, was communicated to Blair until after he gave his testimony in the court of examination.

Now in this attitude of the evidence and under this claim of the respondent, if the fact existed that Blair had knowledge

about this cloth, before or at the time of the examination before the justice, which was within a few days after the commission of the crime, it would be a potent circumstance tending to meet the respondent's said claim. If Blair swore before the justice on this point the same as he swore at this trial, proof to that effect would tend very strongly to show the fact of such knowledge before he received the information upon which he might have made up the story told on this trial. In short, it would exactly meet the phase of the case which the respondent's denial and claim presented. The evidence was admitted solely for this purpose, and, as we think, correctly. Such was the ruling in *McAuley v. R. R. Co.* 33 Vt. 311. It was not admitted, and was not admissible, on the ground that the former testimony was consistent with the latter, and therefore corroborated the latter. It seems that this was once the law in England, where a witness stood discredited from any cause. *Lutterell v. Reynell*, 1 Mod. 282. But later, this doctrine was exploded. *King v. Parker*, 3 Doug. 242; 1 Phil. Ev. 307, note; 1 Stark. Ev. 149, n. And the present English rule has obtained in the American courts, except in some cases based on the early English cases which have since been overruled in England. See collection of same and remarks thereon in 1 Phil. Ev. (C. & H.) pp. 776-779. The admissibility of such evidence for corroboration is squarely denied in this State. *Munson v. Hastings*, 12 Vt. 346. But, as shown under point *three, supra*, the legal authors, Greenleaf, Phillips, Starkie, and others, agree that evidence of former sayings of a witness may under special circumstances be admitted; and such are the decisions. *Robb v. Hackley, supra*, and cases there cited. Loosely speaking, such special circumstances constitute exceptions to the general rule; strictly speaking, this case is not an exception because the testimony was not admitted to confirm the witness, although it indirectly had that effect; but was admitted for the purpose above stated, and its admission was within the reason for the

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admission of such evidence under special circumstances as stated by legal authors and in adjudged cases.

VI. Under this exception the respondent's counsel insists that a person's knowledge of a crime at a particular time can not be established by evidence of its notoriety at that time.

To test the soundness of this proposition, as applied to this case, suppose the proof had been that this village was very small, that this crime had become so generally known on Saturday morning, and had created such an excitement, that the people were mostly in the streets in groups talking about it, and that the respondent had passed along by these groups and stopped and listened to their talk;—clearly, this would have been legal evidence tending to show that he then heard of the crime. The thing therefore which the State started out to prove was legitimate. The failure of the attempt could not change the legal quality of the evidence; it would thereby, even if incompetent, become harmless error, rather than reversible error.

VII. This exception is waived.

VIII. This is but the ordinary attempt to corroborate the testimony of a witness by showing his former declarations. They were properly rejected. *Munson v. Hastings*, 12 Vt. 346. None of the elements exists which would bring this point within the special circumstances under which such evidence is admissible, as alluded to under points three and five above.

IX. As Vinton had testified in his direct examination as a witness in behalf of the respondent, that when he bailed him he advised him to go away to escape civil suit for damages, and that he then *believed* he would come back, it could not, as we think, be legal error for the court to allow the inquiry on cross-examination as to what he *thought* about the respondent's coming back after he, Vinton, had got a bench warrant for him. The materiality of the witness' belief the one way or the other is not very apparent; but the subject was opened by the respondent, and he cannot be heard to complain that the court allowed an inquiry in the same line in cross-examination.

X. there is much force in the reasons stated in some cases why an officer in charge of the jury during their deliberations on a case submitted to them should not be present in the room so as to hear what is said by the respective jurors, and so possibly by his presence impede or hinder a free and full expression of views; and especially when the officer has been a witness on the trial. In Michigan (*People v. Knapp*, 42 Mich. 267), (s. c. 36 Am. R. 438), and in Kansas (*State v. Snyder*, 20 Kan. 306), such presence of an officer has been held, as matter of law, to be good ground for setting aside the verdict. But in this State, as well as some others, it has been held otherwise; especially where it did not appear that any conversation concerning the case had been had by the officer with any of the jurors. *State v. Hopkins*, 56 Vt. 263; *State v. Lockwood*, 58 Vt. 378. The officer's oath plainly contemplates his presence in the room with the jury. He swears not to speak to them about the matters submitted to their charge, except to ask them whether they are agreed, and that he will not disclose the verdict of the jury or any conversation they may have had respecting the cause they have in charge, etc. Moreover, we understand it has been the practice always in this State for the sworn officer having charge of the jury to be present with them more or less during their deliberations. It has the advantage of convenience and it is not understood that bad results have come from the practice.

While such presence of the officer can not, under our practice and decisions, be regarded as cause for setting aside a verdict, it should be regarded as an impropriety, when he stands in peculiar relations to the cause by reason of having been a witness, or for other reasons, and courts and officers of courts should be on their guard to prevent it. Officers for this service should be selected who are not thus obnoxious.

The judgment is that there is no error in the proceedings of the County Court, and that the respondent takes nothing by his exceptions, and that he be sentenced upon the verdict.



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## JOHN W. MARTIN v. A. J. MARSHALL.

*Bill and Notes. Indorsers. Contribution. Negotiable Instruments. Parol Evidence.*

1. In an action between indorsers for contribution, there can be no recovery, where the defendant indorsed the note at the request and for the benefit of the plaintiff, who had agreed with the maker of the note, for the consideration of \$24 to raise the money on it; and the note had been delivered to him for that purpose; and he procured the defendant's endorsement to assist him in getting it discounted.
2. Parol evidence is admissible to prove the true relation between indorsers; and an apparent surety may be shown to be a principal, and an apparent principal a surety.

GENERAL ASSUMPSIT. Pleas, general issue, and Statute of Limitations. Trial by court, December Term, 1886, TAFT, J., presiding. Judgment for the defendant.

It appeared that the Middlebury Paper Company, being indebted to the defendant to the amount of more than \$1,400 on a coal bill of over four months' standing, and being in failing circumstance and desirous of obtaining a loan of money with which to meet its liabilities and carry on its business, made its promissory note for \$2,000, dated December 17, 1873, payable to the order of the plaintiff, thirty days after date, at the National Bank of Middlebury, Vermont; and the members of said company, Oliver Severance, Edwin R. Clay, and George Hammond, together with A. J. Severance, having indorsed their names on the back of the same, the president of said company, said Oliver Severance, in its behalf, procured the plaintiff, who had been in the habit of indorsing commercial paper for the accommodation of said company, for the consideration of \$24, to raise the money for the

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company upon said note, which was delivered to the plaintiff for that purpose.

The plaintiff offered said note at said bank for discount, but said bank refused to discount it without additional indorsers; and the plaintiff subsequently applied to the defendant, stating that he wanted to get the note discounted and wanted the defendant's indorsement.

The court found, as matter of fact, that the note was signed upon the back thereof by Marshall when it was presented to him for signature by the plaintiff, and that he put his name upon the note at the solicitation of Martin, supposing at the time that the principals upon the note were the paper company, Clay, Severance and Hammond; that Martin took the note to Marshall for that purpose, and asked him to indorse it; that Martin told Marshall that he wanted to get the note discounted, and wanted Marshall's indorsement in order to assist him in doing so.

The plaintiff thereafterwards procured said note to be discounted by said bank, and gave the proceeds, less \$24, the consideration aforesaid, to the company.

The paper company having paid about \$600 on the note, the bank brought suit against the plaintiff for the balance due thereon, returnable at the December Term, 1879, of Addison County Court, and at the June Term, 1880, of that court, recovered judgment against him in said suit for \$1,937.46 damages and \$21.86 costs, which sums were paid by the plaintiff, who had been duly charged as indorser, to the bank, soon afterwards, in the year 1880.

The plaintiff's name was written on the back of the note under the name of the defendant.

*Hard & Cushman*, for the plaintiff.

Upon the defendant's theory that the supposed undertaking resulted from the plaintiff's request, etc., it is within the Statute of Frauds. Bro. Fr. s. 122.

If, at the time of the alleged request and signing by the

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defendant, the plaintiff had already become liable upon the paper, the case would be different, and no written promise by him would be necessary; but such was not the fact, and consequently any undertaking of the plaintiff looking to the defendant's indemnity was simply collateral to the undertaking of the parties previously liable upon the paper, who (except A. J. Severance), as respects the defendant, and as the real fact was, were principals, and received the proceeds of the note when it was discounted. 1 Smith, Lead. Cas. (6th Am. ed.), 478, 479; *Holmes v. Knights*, 10 N. H. 175.

In *Bagott v. Mullen*, 33 Ind. 332, the court says: "In all these cases there was something more than a mere request by one surety to another to execute the note or paper. There was either a promise, written or verbal, to indemnify, or a taking security from the principal, and from either of these circumstances the court held such surety released from contributions."

In *McKee v. Campbell*, 27 Mich. 497, the court says: "The law implies from all joint obligations a *prima facie* liability to contribution, which may be overcome by showing that one is bound to protect the other. This may be either because he is a principal debtor on his own account, or because he has undertaken to save the other harmless."

But the mere request to another to join him as co-surety would, upon all ordinary rules of construction, mean that he was to enter upon the same responsibilities, and become bound on equal terms. See *Burnett v. Millsaps*, 59 Miss. 333.

Proof that one of several sureties signed at the request of the others will not, therefore, exonerate him from contribution; it should at least appear that they promised to save him harmless in any event. 1 Lead. Cas. Eq. 160-168.

The location and form of the defendant's signature upon the note, *prima facie* at least, subjects him to the liability of a maker. *Nash v. Skinner*, 12 Vt. 219, 227; *Strong v. Riker*, 16 Vt. 554, 557; *Flint v. Day*, 9 Vt. 345, 347; *Sylvester v. Downer*, 20 Vt. 353, 358.

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He stands in the same relation to the plaintiff as any maker of a note to an indorser. Story, Prom. Notes, ss. 134, 135; 1 Dan. Neg. Inst. s. 666; *Kelly v. Burroughs*, 3 Cent. Rep. 187; 102 N. Y. 93; 1 Lead. Cas. Eq. 162, 164; *Sweet v. McAllister*, 4 Allen, 353.

*Stewart & Wilds*, for the defendant.

The defendant appearing to have indorsed the note before the payee renders the indorsement irregular, and as to third parties relying upon the appearance of the note, many and various are the conflicting presumptions of law entertained by various courts as to the quality of the indorser's obligation. But these presumptions have no place in this discussion. This suit is between the very parties to the endorsement. And the case shows: 1. That it was the plaintiff's duty, voluntarily assumed for a valid consideration, to raise the money on this note for the company. 2. That the defendant lent his signature to the plaintiff solely at the latter's solicitation. 3. That it was solely for the plaintiff's accommodation. 4. That it was totally without consideration to the defendant. Rob. Dig. p. 93, s. 18; *Sylvester v. Downer*, 20 Vt. 358; 2 N. E. Rep. 706, note; *Montgomery v. Edwards*, 46 Vt. 151; *Strong v. Dodds*, 47 Vt. 354.

The opinion of the court was delivered by

POWERS, J. The note in form was executed by the Middlebury Paper Company, bearing the endorsement of its individual members, to the order of the plaintiff. The maker of the note made a contract with the plaintiff, for the consideration of \$24, to raise the money for the company upon said note. To carry out his contract the plaintiff procured the defendant's endorsement of the note.

The defendant endorsed the note for the plaintiff's benefit, not for that of the company. As between the parties, the defendant came into the relation of a surety for the plaintiff, and the plaintiff was bound to indemnify the defendant against loss

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by reason of his endorsement. As between the parties to the endorsement upon the note, parol evidence may be received to show their true relation to each other. An apparent surety may be shown to be a real principal, and an apparent principal may be shown to be a real surety.

The defendant having signed merely for the accommodation of the plaintiff, is not liable to contribution, as the plaintiff, so far as the defendant is concerned, has paid his own debt.

Judgment affirmed.

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WILLIAM HORAN v. WILLIAM THOMAS AND  
ANOTHER.

*Justice Ejectment Act.* R. L. s. 1321.

In an action under the justice ejectment act—R. L. s. 1321—a lessor is entitled to a judgment without demand of rent in arrears or notice to quit after breach of the stipulations in a written or verbal lease as to the payment of rent.

ACTION brought under section 1321, Rev. Laws, to recover possession of a house, barn and two acres of land in Bridgeport. The action was commenced before a justice of the peace, and an appeal was taken by the defendants to the County Court. Plea, general issue. Trial by court, June Term, 1887, ROWELL, J., presiding. Judgment for the plaintiff for the possession of the premises and for \$53.82 damages, which was the amount of rent of said premises for the whole time of defendants' occupancy after deducting \$4 paid.

The court found: That on or about the 25th day of June, 1886, the plaintiff and the defendant Howard entered into a verbal contract to the effect that Howard was to pay the plain-

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tiff \$16 during the first week in the next July, as and for the rent of the premises for four months, beginning on the 8th day of the preceding May, at which date Howard had come into possession thereof; that Howard had theretofore paid to one Bennett \$4 for rent for the first month of his occupancy, and it was agreed between them that that \$4 was to go in part payment of the \$16, leaving \$12 to be paid during the first week of July, and that, if he paid the same as stipulated, said Howard was to occupy the premises for four months from May 8, and was to continue to occupy them for an indefinite time thereafter upon payment of \$4 a month in advance, and that said Howard had never paid said balance of \$12, or any part thereof.

In respect to demand and notice the court found that in the latter part of July the plaintiff, in effect, demanded the rent of Howard at said Bennett's store, and told him if he did not pay it he must quit the premises, and threatened legal proceedings to recover possession of the premises. The writ in this suit was dated the 5th, and served on the 9th of the following August.

The court held, as a matter of law, that this action is the same in legal effect under the statute as the common law action of ejectment for non-payment of rent, and that if any notice to quit was necessary, the facts found, and the bringing of the action itself, were sufficient.

*Tupper & Bliss*, for the defendant.

As no stipulation for re-entry on non-payment of rent, and no common law demand was found, the plaintiff cannot recover unless the provisions of the Rev. Laws, s. 1259, are applicable to this action. *Smith v. Blaisdell*, 17 Vt. 212; *Willard v. Benton*, 57 Vt. 286; *Van Rensselaer v. Jewett*, 2 N. Y. 141.

Section 1259 was enacted in 1818 (Sess. Laws, 1818, p. 59) and appeared substantially in its present form in the revision of 1838 (Rev. Stat. chap. 5, s. 14). The act creating the tribunal before which this action was brought, with jurisdic-

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tion of cases where the tenant holds possession "without right after the determination of the lease by its own limitation," is No. 39 of the Acts of 1842. The words extending the jurisdiction to cases of breach of stipulation by the lessee or person holding under him were added by No. 17, Acts of 1850.

This court does not call this action an action of ejectment, but "a freehold action" and "a proceeding under the statute of 1842" (*Middlebury College v. Lawton*, 23 Vt. 688); a prosecution under section 30 of the Act entitled "Forcible Entry and Detainer" (*Hadley v. Havens*, 24 Vt. 520); "an action under the statute brought before a justice of the peace to recover possession," etc. (*Barton v. Learned*, 26 Vt. 193); "Forcible Entry and Detainer" (*Davis v. Hemenway*, 27 Vt. 590, and *Pitkin v. Burch*, 48 Vt. 521); "an action brought before a justice of the peace to recover possession," etc. (*Baldwin v. Skeels*, 51 Vt. 121, and *Barnes v. Tenney*, 52 Vt. 557).

Nor does the court treat it as an action of ejectment. "The suit may properly be regarded as analogous to the action of ejectment." *Middlebury College v. Lawton*, 23 Vt. 695.

It is said by Judge BENNETT to be a "substitute for an action of ejectment" (Ben. Vt. Justice, 154); a thing which is analogous to, or a substitute for, another thing, is not identical with it.

We submit that the Act of 1842 (Rev. Laws, s. 1321, *et seq.*) is a statute creating a new tribunal and conferring new remedies in derogation of the common law, and is not to be aided by construction.

It is to be borne in mind that this act has created a tribunal of a special and limited jurisdiction for the purpose of trying those specific cases which are mentioned in the act, and no matter can be prosecuted before that court but such as are within its express letter. *Hadley v. Havens*, 24 Vt. 520; *Pitkin v. Burch*, 48 Vt. 523; *Benjamin v. Benjamin*, 1 Seld. 383; *Farrington v. Morgan*, 20 Wend. 207; *Davis v.*

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*Hemenway*, 27 Vt. 594; *Willard v. Benton*, 57 Vt. 286; *Maidstone v. Stevens*, 7 Vt. 487.

*Eldredge* and *Slade*, for the plaintiff.

The plaintiff contends that the right to the occupancy of the premises was limited by the terms of agreement; that defendant, by the neglect to pay the \$12 during the first week in July, lost all right to the further occupancy of the premises; that by his own act, though at first lawfully in possession, his interest therein was determined.

He had no interest which he could transfer or assign to another. The condition upon which he had occupied up to the time, and upon which his future occupancy depended, had been broken. His continuance in possession after condition broken was at the sufferance of the plaintiff. He was a tenant at sufferance, and being such he was not entitled to any notice to quit. *Hollis v. Pool*, 3 Met. 350; 1 Hill Real Prop. (4th ed.) 394; 1 Washb. Real Prop. (3d ed.) 541; *Ford v. Steele*, 54 Vt. 562.

The neglect to pay the amount at the time stipulated dissolved the relation of landlord and tenant that had previously existed. It is well settled that when the relation of landlord and tenant does not exist no notice to quit is necessary. *Adams*, Eject. (4th ed.) 140; *Middlebury College v. Lawton*, 23 Vt. 688; *Hadley v. Havens*, 24 Vt. 520.

The opinion of the court was delivered by

POWERS, J. It matters little what name we give to the remedy given by section 1321, R. L., for the recovery of the possession of leased lands held "without right" by a lessee. Some courts call it one thing, some another. But

"What's in a name? that which we call a rose,  
By any other name would smell as sweet."

This statute gives a summary remedy to persons entitled to the possession which is wrongfully withheld, and was intended as a substitute for the technical procedure of the common law



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action of ejectment. If the lessee or any one holding under the lease withholds the possession "without right" after the expiration of the lease, or after a breach of its stipulations, he is amenable to this action.

The stipulation in this lease was that the defendant Howard should pay his monthly rent in advance. At the beginning of the month he had no "right" whatever under the lease until he paid the rent. There were then successive breaches of the stipulations of the lease, for any one of which the plaintiff had this remedy.

No questions respecting the plaintiff's title, demand of rent in arrear, or notice to quit, are involved in this proceeding. If the plaintiff is entitled to the possession, whether as the titleholder or otherwise, he is qualified to sue. If the defendant is not entitled to the possession, or, as the statute puts it, holds it without right, he is liable to be sued. The form of the declaration is presented in section 1322; and it is clear that the legislature in this proceeding intended to avoid both the delays and the technicalities of the old action of ejectment, otherwise there would seem to be little gained by the enactment.

The judgment is affirmed.

TOWN OF FERRISBURG v. H. C. MARTIN, G. W.  
PALMER AND JOHN BIRKETT.

*Collector's Bondsmen, Liability of. Payment, Application  
of. R. L. ss. 441, 2693. Reference.*

1. The relation of a tax collector's bondsmen to the town is that of sureties; and they are not to be held beyond the precise terms of their contract.
2. When a tax collector makes a payment of taxes collected, and fails to state how they should be applied, and when the treasurer also fails to notify the bondsmen that no application has been made, as provided by statute—R. L. s. 441—an arbitrary application made by the treasurer is not conclusive. Money collected and paid to the treasurer when the bondsmen were sureties should be applied in extinguishment of their liability, unless they consented to a different application.
3. To determine the liability of the bondsmen it is necessary to ascertain what tax bills were delivered to the collector during the time named in the bonds, the amount collected and when collected, and the amount paid to the town treasurer and when paid; and where these facts are not found by the referee the case will be re-committed.
4. It is not a breach of official duty on the part of a collector to neglect to account for uncollected tax bills where no warrants were annexed to them.
5. A list is not legal which is not signed by a majority of the listers.

ACTION of debt on bonds executed by a tax collector with sureties. Heard on the report of a referee, June Term, 1887, ROWELL, J., presiding. Judgment *pro forma* on the report for the plaintiff to recover \$2,290.14.

The referee found that only one of the three listers of the plaintiff town, in 1878, signed the oath required by section 36 of chapter 83 of the General Statutes; but the *jurat*, signed by the justice of the peace, stated that the three (naming them) subscribed the oath. The other facts are sufficiently stated in the opinion.

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Town of Ferrisburg v. Birkett.

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*Eldridge & Slade*, for the defendants.

The defendants are not liable for uncollected taxes on tax bills where no warrants were annexed. *Tunbridge v. Smith*, 48 Vt. 648; 3 U. S. Dig. p. 62, s. 1174. Nor are they liable for the uncollected taxes of 1878, when only one lister signed the oath. Gen. Stat. p. 522, s. 36; *Reed v. Chandler*, 32 Vt. 285; 41 Me. 537; Cases, *supra*. Nor are the sureties liable for deficits occurring prior to the time they signed the bonds. *Ward v. Stahl*, 22 Alb. L. Jur. 94; *Thomas v. Blake*, 19 Alb. L. Jur. 519; *Vivian v. Otis*, 1 Am. Rep. 199; *Rochester v. Randall*, 7 Am. Rep. 519; 20 Am. Rep. 266. Sureties are only liable for default during the term of the bond. *Van Sickle v. Buffalo*, 42 Am. Rep. 753; *Commonwealth v. Colè*, 46 Am. Dec. 509; *State Treasurer v. Mann*, 34 Vt. 371. The money collected on the lists of 1880, and subsequent lists, while the defendant sureties were on the collector's bonds, should be applied on those lists. 10 U. S. Dig. p. 84, s. 1024; *St. Albans v. Failey*, 46 Vt. 448.

*Stewart & Wilds*, for the defendant.

These general payments should be applied to liquidate any balances due the town from the collector arising out of the tax bills previous to 1880.

The rule is well settled in this State and in the United States Supreme Court, as well as in England, that general payments and credits will be applied to extinguish indebtedness in the order of time in which they accrued. Per REDFIELD, J., *St. Albans v. Failey*, 46 Vt. 448; *Coleraine v. Bell*, 9 Met. 469; *Sandwich v. Fish*, 2 Gray. 298; *Robie v. Briggs*, 59 Vt. 448; *Langdon v. Bowen*, 46 Vt. 512; *Readfield v. Shaver*, 50 Me. 36.

The opinion of the court was delivered by

ROYCE, Ch. J. This is an action of debt on bonds executed by the defendant H. C. Martin as principal, and the other de-

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fendants as sureties, conditioned for the faithful performance by the said H. C. Martin of the duties of first constable and collector for the town of Ferrisburgh for the years 1880, '81, '82, '83 and '84. The breaches complained of are that the said Martin did not account for certain tax bills confided to him as collector during the aforesaid years. The case was heard upon the report of a referee.

It is found that said Martin was elected first constable and collector in 1875, and was annually elected and held said office until the first Tuesday of March, 1885, and that during that entire period he seasonably received from the selectmen of the town the annual town tax bills, and that they also seasonably placed in his hands for collection certain State and school tax bills and lists of unpaid highway taxes. No warrants were annexed to any of said bills, except the town tax bills for 1876, '77 and '78, and the highway tax bill on the list of 1877, and the grand list for 1878, not having been signed by a majority of the listers, was not a legal list. *Reed v. Chandler*, 32 Vt. 285. Said Martin collected a large amount on said tax bills, but the dates of such collections were not shown, and the question here presented is whether he accounted for the moneys so received agreeably to the conditions named in his bonds during the time that Birkett and Palmer were his sureties. Their relation to the town was that of sureties, and their rights and liabilities are to be determined under the rule promulgated in *State Treasurer v. Mann*, 34 Vt. 378: "That they are not to be held beyond the precise terms of their contract," and that where the surety's engagement relates to a particular office, it extends only to such things as were included in the office when the engagement was entered into. *Chitty on Contracts*, 523. It is made the duty of the selectmen, by section 2693, to make out and deliver to the collector tax bills for the collection of state, town and highway taxes, and to annex to the town and highway tax bills warrants for their collection. Without such warrants the collector would be powerless to enforce payment, and it would not be a breach

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of official duty to neglect to account for such tax bills. But whatever sums the taxpayers have voluntarily paid on such tax bills become the property of the town, and were received by the collector in the discharge of his official duty. *Tunbridge v. Smith*, 48 Vt. 648. The first bond declared upon was executed on the 3d day of May, 1880, and was conditioned for the faithful execution of the office of constable and collector by Martin for the year ensuing, and the other bonds were in like form and executed yearly thereafter.

It was the duty of the collector to pay over the amount he might receive on the tax bills to the town treasurer, and that was the official duty that the sureties by their bonds guaranteed that he should perform. They did not assume any liability for the disposition of the money after it had been paid to the treasurer, and can not be made liable on account of any appropriation or misappropriation that may have been made of it. It is true that by section 441 it is made the duty of the collector, when he makes any payment on account of taxes collected, to state the tax on which it shall be applied, and if he fails to do so it is made the duty of the treasurer to immediately notify his bondsmen that no application has been made, and that unless the collector shall direct an application within ten days, the application made by the treasurer shall be conclusive, thus plainly indicating that in the application of payments which may affect the liabilities of bondsmen they have the right to be heard. And in the absence of opportunity to be heard, the arbitrary application of payments made by the treasurer would not be conclusive of their liability.

It was said by Judge SPENCER in *Ludlam v. Simmond*, 2 Caines' Cases in Error, that sureties were favorites of courts of law and would not be bound beyond the scope of their engagements. To enlarge their liability as the result of what was done by the treasurer would be substituting another contract in lieu of the one entered into by the parties.

It was the right of the sureties to have the money collected by the collector and paid over to the treasurer on the tax bills

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that were delivered to him during the time they were his sureties applied in extinguishment of their liability, unless they consented to a different application being made. To determine the question of the liability of the sureties it is necessary to ascertain what tax bills were delivered to the collector during the time named in the bonds declared upon, the amount collected by him on the same, and when collected, the amount paid by him to the town treasurer, and when paid. The facts found by the referee, and the tables appended to his report, do not furnish that necessary information. So no judgment can be rendered in the case as it is now presented.

The judgment is reversed and cause remanded in order that it may be re-committed to have the above facts found.

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SIMEON DENNO v. J. M. NASH.

*Chattel Mortgage. Replevin. Attaching Creditor. Assignment.*

1. When a creditor of a mortgagor attaches a part of his property covered by a chattel mortgage, and tenders to the mortgagee the amount due to him, and he accepts it and delivers the note and mortgage to the creditor, it effects an equitable assignment of the debt and mortgage.
2. And, if the creditor subsequently obtains an execution against the mortgagor and delivers it with the note and mortgage to an officer, who, under the creditor's directions, takes the property, a part attachable and a part not, into his possession, the mortgagor cannot maintain replevin for that which was exempt.
3. In such case, the court refused to decide whether the creditor had a right to apply any portion of the value of the non-attachable property in reduction of the mortgage debt, to enable him to satisfy his execution out of the excess.

REPLEVIN for horse and cow. Heard by the court, December Term, 1886, TAFT, J., presiding. Judgment for the defendant.

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It appeared that, after Maynard placed the note and execution in the hands of the defendant constable, he took the property into his possession and held it until replevied. The court found as matter of fact that the note and mortgage were delivered by Everts to Maynard because Everts understood the law required him to do so, and not under an agreement to assign the same to Maynard; and that the rights of Maynard in relation to the note and mortgage were only such as he had acquired under the statute in relation to the attachment of property covered by mortgage. The other facts appear in the opinion.

*Chas. F. Kingsbury*, for the plaintiff.

The right to attach mortgaged personal property is derived from the Revised Laws, ss. 1180 to 1186.

Before the statute a mortgagor's interest in such property could not be reached by attachment. *Norris v. Sowles*, 57 Vt. 360; *Budlam v. Tucker*, 1 Rich. 389.

The statute, by using the words "*such property*" and "*the same*," limits the attaching creditor's rights to non-exempt property. See ss. 1180 to 1184. And in subrogating him to the rights of the mortgagee only gives him power to sell "*the same*." See s. 1184; *Thompson, Homest. & Exemp.* ss. 425, 441, 740, 741.

This sale is by virtue of the attachment or execution lien, not the mortgage lien. Sections 1184, 1549, 1977, 1978.

The proceedings are different.

The mortgage and attachment liens cannot co-exist. *Evens v. Warren*, 122 Mass. 303.

The statute redeems the non-exempt property, but does not assign the mortgage. *Cochrane v. Rich*, 5 Eastern Rep. 531; 142 Mass. 15.

*Tupper & Bliss*, for the defendant.

To prevail, the plaintiff must either have been the legal owner of the property, or entitled to the possession. R. L.

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s. 1230; *Langdon v. Baxter National Bank*, 57 Vt. 1; *Wills v. Barrister*, 36 Vt. 220; *Collamer v. Page*, 35 Vt. 391.

He was not the legal owner. *Wood v. Dudley*, 8 Vt. 430; *Blodgett v. Blodgett*, 48 Vt. 32.

The opinion of the court was delivered by

Ross, J. Henry D. Maynard, in a suit against the plaintiff, caused to be attached certain articles of personal property which were covered by a chattel mortgage held by A. M. Everts. In addition to the personal property attached, the mortgage also covered the horse and cow for the recovery of which this suit of replevin is brought. The horse and cow were exempt from attachment. The officer making the attachment, in accordance with the provisions of the statute, demanded of Everts a disclosure of the sum due on the mortgage. Everts made such disclosure. Maynard then tendered Everts the sum due on the mortgage. It is needless to inquire, whether, inasmuch as the horse and cow were exempt from attachment, Everts was legally bound to accept the tender. He did accept it, and delivered to Maynard the mortgage and the note secured by it. Such delivery, at the least, effected an equitable assignment of the debt and the mortgage securing its payment. If the plaintiff had then settled the suit in which the other mortgaged property had been attached, the mortgaged property would still have been holden for the payment of the debt then in Maynard's hands secured by the mortgage. This debt was then overdue and the condition of the mortgage broken. In the mean time Maynard had recovered judgment in the suit in which the other articles of property covered by the mortgage were attached. He took out an execution on the judgment, and delivered it, with the note and mortgage securing it, which covered the horse and cow in controversy, to the defendant. The plaintiff thereupon, before a sale of any of the property on the execution, brought this suit and replevied the horse and cow. The contention is whether



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on these facts he is entitled to maintain the action. We think that he is not. The defendant, as the agent of Maynard, holds the overdue note and chattel mortgage securing its payment. When the condition of the mortgage became broken by the plaintiff's failure to pay the note as it fell due, the defendant, the holder of the note,—although but the agent of Maynard—was, by the terms of the mortgage, entitled, against the plaintiff, to the possession of all the property covered by the mortgage. This was the legal result flowing from the breach of the condition of the mortgage, regardless of the attachment of a part of the property covered by the mortgage. The defendant, as the agent of Maynard held the mortgage and the debt secured by it, and the plaintiff was no more legally entitled to take the horse and cow covered by the mortgage from him, in a suit of replevin, than he would have been to take it from Everts, if the condition of the mortgage had become broken while in his hands, and he, for that reason, as he lawfully might, had taken possession of the mortgaged property. On these views, the judgment of the County Court for a return of the property was correct,—without considering or deciding the questions which have been pressed upon our attention, in regard to whether Maynard, as an attaching creditor, has a right to apply any portion of the value of the horse and cow in reduction of the debt secured by the mortgage, in order to enable him to satisfy his execution out of the excess of the value of the other mortgaged property above the balance of the mortgage debt. Such questions will be considered and decided, when their decision is necessary to the decision of the case. The judgment of the County Court is affirmed.

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## WILLIAM N. FARNHAM v. CHARLES A. CHAPMAN.

*Replevin, Title to Property Pendente Lite. Evidence.*

R. L. s. 1230.

In a replevin suit, where the writ alleges the title to the property to be in the plaintiff, a trial upon the merits determines the ownership; and the plaintiff acquires no title or right to sell the property by filing a bond in accordance with the statute; thus, when during the pendency of a replevin suit, the plaintiff's agent sold the horse replevied and gave his personal warranty of title, and the suit resulted in a judgment for a return of the property, it *was held* in an action for a breach of warranty that evidence was admissible to show the above facts; and that the purchaser was entitled to recover.

ASSUMPSIT for breach of warranty in the sale of a horse. Plea, general issue. Trial by jury, June Term, 1887, ROWELL, J., presiding.

The court ruled for the purpose of testing the question that the defendant did convey a valid title to the horse to the plaintiff, as against Hope; that the plaintiff could not recover on his own offer; and directed a verdict for the defendant.

*Eldridge & Slade*, for the plaintiff.

The principal question is whether the defendant could pass a valid title to the horse. The title, as well as the damages, may be tried in an action of replevin. *Fisk v. Wallace*, 51 Vt. 418.

In *Collamer v. Page*, 35 Vt. 391, the court say as follows: "If the case be tried upon the merits, then of course the question of *title*, or right of possession, is tried, and then if the title or right of possession is found for the defendant, he is entitled to a judgment for a return as a conclusive judgment in chief."

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The same doctrine is held in other states. *Armell v. Leyton*, 33 Kan. 42; *Pierce v. King*, 14 R. I. 611; *Herdic v. Young*, 55 Pa. St. 176; *King v. Ramsey*, 13 Ill. 619.

During the pendency of the suit, the property does not vest in the plaintiff; if it did, there would be no necessity of a judgment. *Lovett v. Burkhart*, 44 Penn. 173; *White v. Dolliver*, 113 Mass. 402; 68 Penn. St. 221. If it appears on trial that the defendant is entitled to a return of the goods, he has judgment therefor. R. L. sec. 1233. The defendant could give the plaintiff no better trial than Stapleton had; hence Farnham got no title. *Lockwood v. Perry*, 9 Met. 440, is decisive of this case. *Saunderson v. Lace*, 1 Chand. (Wis.) 231. Pennsylvania and Delaware are the only states in which a plaintiff in a replevin suit can give a claim-property bond and pass the title by sale *pendente lite*. *Morris, Replevin*, 281 *et seq.*; *Hocker v. Striker*, 1 Dall. 245; *Pierce v. Humphreys*, 14 S. & R. 23, 25; *Balsley v. Hoffman*, 13 Penn. 603; *Weaver v. Lawrence*, 1 Dall. 167.

*L. E. Knapp* and *W. H. Bliss*, for the defendant.

For the purpose of trade, possession of personal property is *prima facie* evidence of ownership. *Dick v. Cooper*, 64 Am. Dec. 652; *Magee v. Scott*, 55 Am. Dec. 49.

The laws of this State, do not, in terms, determine what protection shall be given to third parties purchasing personal property awaiting the action of the courts in determining its title; and it devolves upon this court to determine what constitutes an "unlawful" detention, within the meaning of section 1230 R. L. And not having been passed upon, the court will, under proper legal restrictions, settle the question in such a way as will best conduce to the public welfare and protect the rights of all parties.

Replevin will not lie for an illegal detention of chattels, when a party comes into possession of them by delivery from a person having special property therein. *Marshall v. Davis*, 1 Wend. 109; *Carpenter v. Stevens*, 12 Wend. 589.

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In the common law action, in distress for rent, it is held that the bond is substituted for the property. *Woglam v. Cowperthwait*, 2 Dall. 68; *Frey v. Leeper*, 2 Dall. 131; *Wells, Replevin*, 469.

It is the well settled law in Pennsylvania, that a plaintiff in replevin, who has given a good bond and has possession, can sell or dispose of the chattels taken, and pass a title to the purchaser, being answerable on his bond. *Stewart v. Wolfe*, 5 Central Rep. 681; *Bane v. Lyle*, 68 Pa. 64; *Morris, Replevin*, 248 (230); *Gray v. Wilson*, 4 Watts (Pa.), 39; See also *Acker v. White*, 25 Wend. 613.

The defendant's remedy is on the bond. *Morris, Replevin*, 286. When he retains the property and gives a claim-property bond, the plaintiff's title, if he had any, is turned into a claim for damages.

When the property is likely to perish, the plaintiff is justified in selling or consuming it. *Wells, Replevin*, 480. See *Gordon v. Jenny*, 16 Mass. 465.

Opinion of the court was delivered by

Ross, J. The action of replevin, in this State, is given and regulated by statute. It is applicable to beasts distrained, to goods attached, and to other goods. The requisites of the bond to be given and the form and effect of the judgment in each case are prescribed by statute. Being thus given and limited by statute, little aid can be derived from the decisions of courts in other jurisdictions, unless it is first shown, that they were rendered upon statutes of similar substance and effect. In the case of beasts distrained there is no provision by which a judgment for a return of the property can be rendered, while in the case of goods attached and of other goods, such a judgment may be rendered. But in the case of goods attached, the replevin must be by the defendant in the suit in which the attachment is made, and the suit in replevin is only, in legal effect, a receipt of the property. But in the case of the replevin of other goods, the suit is predicated upon

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the plaintiff's claim of ownership of the goods, or of right to their possession, and which he claims have been unlawfully taken, or unlawfully detained from him by the defendant. The suit puts in issue the plaintiff's ownership, or right to the possession of the goods as against the defendant. The proper plea to the declaration is, not guilty, and it puts in issue the claim of the plaintiff set forth in the declaration. If upon nonsuit of the plaintiff, or upon trial, it appears that the defendant is entitled to a return of the property, he shall have judgment therefor. R. L. sec. 1230, *et seq.* The plaintiff offered to show that Stapleton brought an action of replevin against Hope claiming title to a horse; that pending that action he purchased the horse of Stapleton's agent, the defendant, who gave his personal warranty that by such sale the plaintiff obtained a good and valid title to the horse. The Stapleton replevin suit resulted in a judgment for a return of the horse to Hope. This judgment in favor of Hope not having been satisfied in any way, he brought an action of replevin for the horse against the plaintiff. Judgment therein was rendered in favor of Hope against the plaintiff, the latter making no defence. Upon the plaintiff offering to show these facts, in support of this action upon the defendant's personal warranty of the title of the horse to him, the defendant claimed that his sale of the horse to the plaintiff as the agent of Stapleton conveyed to the plaintiff a valid title to the horse against the judgment for a return of the horse in the replevin suit in favor of Stapleton against Hope, and against the subsequent replevin suit in favor of Hope against the plaintiff; and that if Hope had fully defended the last named suit upon its merits, it would have been so determined. He contends that the bond given by Stapleton took the place of the horse, and therefore Stapleton could deal with the horse as his own against Hope, and all claiming under him. The defendant's counsel cites and relies upon the decisions of the Supreme Court of Pennsylvania and of some other states in which it has been held that under the statutes in those states, or under a practice

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that has prevailed, the defendant, in a replevin suit, has the right to give a claim-bond for the property, in which case the property does not pass into the possession of the plaintiff, but the bond takes the place of the property, and the defendant can then convey a valid title to the property; or if the defendant fails to give the claim-property bond, and the property is given into the possession of the plaintiff, the plaintiff may then convey a good title to the property against the defendant, although he should recover in the suit a judgment for the return of the property. But these decisions arising upon statutes unlike those of this State, and under a practice very unlike any that prevails in this State, can furnish but little aid in construing the statutes of this State. In *Collamer v. Page*, 35 Vt. 387, *Thurber & Co. v. Richmond*, 46 Vt. 395, and *Fisk v. Wallace*, 51 Vt. 418, it has been held, and we think correctly, that, when in a replevin suit the plaintiff alleges the title to the property to be in him, a trial of the case upon its merits tries and determines his title to the property as against the defendant in that suit. The bond which the plaintiff must give to entitle him to receive the property into his possession is conditioned, among other things, for a return of the property to the defendant if he fails to establish that he has title to the property, and the judgment in that case is for a return of the property to the defendant. This makes Stapleton's case against Hope one in which his title to the horse was put in issue and determined against him, and Hope obtained a judgment for the return of the horse to him. The plaintiff purchased the horse of the defendant as the agent of Stapleton, *pendente lite*, and could only acquire such right to the horse as Stapleton might in the suit establish that he had. Stapleton failed to establish that he had title to the horse, consequently, the plaintiff acquired no title by the purchase, and could not have successfully resisted Hope's suit in replevin for the horse. Any other holding would nullify the judgment in Hope's favor for the return to him of the horse. But the defendant contends that public policy

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favors the free transfer and sale of personal property. By the owner it does, but not by one who sets up an unfounded claim to it. The defendant's contention, carried out, would allow any one desirous of obtaining some article of his neighbor's property, by resorting to a suit of replevin, to obtain it at the appraisal of men, however much the neighbor desired to retain the article for his own use or enjoyment. We think the evidence offered by the plaintiff was admissible, and if found true, entitled him to recover of the defendant.

The judgment of the County Court is reversed and cause remanded.

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ANDREW BAIN v. A. J. CUSHMAN.*Evidence. Opinion. Damage.*

In an action against a physician for unskillful professional treatment, the plaintiff's opinion is not admissible on the question of damages, when he is able to describe all the facts bearing upon that question.

TRESPASS on the case for the alleged negligence and unskillfulness of the defendant as a physician and surgeon in his professional treatment of the plaintiff while a patient of the defendant, whereby the plaintiff was injured. Plea, general issue. Trial by jury, December Term, 1886, TAFT, J., presiding. Verdict for the plaintiff.

On trial the plaintiff, a farmer and not a professional man, claimed and testified that on the 15th day of October, 1884, being suddenly attacked with some difficulty or disorder of his urinary organs, he employed the defendant as a physician and surgeon, to attend upon and treat him for the difficulty

with which he was so suffering, and the defendant continued to treat him therefor for several days.

The plaintiff's testimony further tended to show that the defendant's treatment was unskillful and negligent, and that in consequence thereof he suffered great and unnecessary pain ; and that the injuries inflicted upon the plaintiff because of the defendant's unskillfulness and negligence were likely to be permanent.

The question was then put to the plaintiff by his attorney, "What is your damage from the ill treatment the doctor gave you?" To which the defendant objected, but the objection was overruled and the plaintiff answered: "If I was well, and had to go over it again, I would not for the best farm in town—in money, \$800."

The plaintiff claimed, and his evidence tended to show, that the disease with which he was suffering, was the retention of urine in the bladder,—an excessive accumulation of urine in the bladder, which the patient could not discharge without the aid of a catheter.

The defendant's testimony tended to prove that he put the plaintiff upon proper treatment.

*W. W. Rider and Hard & Cushman*, for the defendant.

The error in allowing the question to be put is most obvious. "Opinions of witnesses are not admissible as to the amount of damages for a personal injury." *Pierce R. R.* 297; *NELSON*, Ch. J., in *Lincoln v. S. & S. R. R. Co.* 23 Wend. 425 (Bk. 14 L. ed. 421); *Cent. R. R. Co. v. Kelly*, 58 Ga. 107. In *Hastings v. Steamer Uncle Sam*, 10 Cal. 341, the court say: "This testimony was clearly improper. The opinions of witnesses are generally admissible only when they relate to matters of science or art, or to skill in some particular profession or business. The estimate of the witness was but his judgment from facts, and could not be substituted for that of the jury." "It is the peculiar province of the jury to make assessment of damages in such cases." *Wilcox v. Leake*, 11



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La. An. 178; 24 Tex. 170; 13 U. S. Dig. (N. S.) 353; 17 Wend. 137 (Bk. 13 L. ed. 88); *Oakes v. Weston*, 45 Vt. 430; *Fraser v. Tupper*, 29 Vt. 409; 2 Sedg. Dam. 632.

*Stewart & Wilds*, for the plaintiff.

The general rule, that a witness not a party is excluded from expressing his opinion as to the quantum of damages, has its exceptions when the question involved is one of value. *Vandine v. Burpee*, 13 Met. 288.

Witnesses are permitted to give their opinion in cases where "the facts and circumstances which lead the mind of the witness to a conclusion, are incapable of being detailed and described so as to enable any one but the observer himself to form an intelligent conclusion for them." *Cavendish v. Troy*, 41 Vt. 108; *M'Kee v. Nelson*, 4 Cow. 355; 2 Sedg. Dam. 589.

The opinion of the court was delivered by

ROYCE, Ch. J. The question put to the plaintiff upon his examination as a witness in his own behalf called for an expression of his opinion as to the damage he had sustained in consequence of the defendant's negligent and unskillful professional treatment of him as his physician and surgeon. The answer given by him was intended to be and was no doubt treated as evidence upon the question of the damages that the plaintiff was entitled to recover; thus, leaving the damages to be estimated upon opinion given rather than upon facts that were put in evidence.

It is an elementary rule in the law of evidence that opinions other than those of experts are inadmissible as evidence. It is not claimed that the question was admissible unless it came within some exception to that rule. It is claimed that the facts and circumstances which led the mind of the witness to a conclusion were incapable of being detailed and described so as to enable any one but himself to form an intelligent conclusion from them, and that those circumstances brought the

question within a well-recognized exception to the above rule. The case of *Cavendish v. Troy*, 41 Vt. 99, is relied upon as authority in support of that claim. But in that case it is said that where all the pertinent facts can be sufficiently detailed and described, and where the triers are supposed to be able to form correct conclusions without the aid of opinion or judgment from others, no exception to the rule is allowed. Here the witness might have detailed and described all the facts bearing upon the question of the amount of damage he had sustained; and when they were thus detailed and described to the jury there is no reason apparent why the jury would not have been able to form a correct conclusion and judgment without the aid of the opinion of the witness.

So that the question did not come within the exception claimed, and it was error to allow it to be put and answered.

The judgment is reversed and cause remanded.

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Darling v. Robbins.

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EHUD DARLING v. CHARLES M. ROBBINS AND  
OTHERS.

[IN CHANCERY.]

*Equitable Lien. Reservation in Deed. Foreclosure.*

A reservation in a warranty deed of land of the crops that might be produced thereon, to secure the interest on the purchase money, is a valid lien and may be foreclosed.

PETITION to foreclose an equitable lien. Heard on the pleadings, December Term, 1887, TYLER, Chancellor. Decree of foreclosure for the petitioner. The case appears in the opinion.

*Hunton & Stickney* and *W. H. Bliss*, for the defendants.

The reservation gave the petitioner no right to a decree of foreclosure. It is repugnant and inconsistent with the grant. Bac. Abr. Tit. Grant; *Athington v. Bishop of Chester*, 1 H. Bl. 418; Bish. Con. s. 386; 4 Greenl. Cruise, 244; *Rose v. Bunn*, 21 N. Y. 278; *Hutchinson v. Ford*, 15 Am. Rep. 711; 46 Am. Dec. 715.

All the cases upholding such lien in this State are cases of lease, and go upon the express ground that the lessor is the absolute owner of the soil. *Leland v. Sprague*, 28 Vt. 746; *Cooper v. Cole*, 38 Vt. 185.

We can find no case where such a reservation in a deed conveying the fee has been held good. The point was not raised in *Batchelder v. Jenness*, 59 Vt. 104; and the decision, so far as it has any bearing, is adverse.

As to the crops, it is an attempt to reserve something from

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the grant which is not included in it. A warranty deed does not convey the crops which may grow upon the land after the grant.

The crops of each year are security for the interest of such year. *Buckmaster v. Needham*, 22 Vt. 617.

*J. J. Wilson*, for the petitioner.

A reservation in a deed of real estate, of the crops to be thereafter grown thereon, to secure the payment of the purchase money, or rent, is a valid reservation. *Batchelder v. Jenness*, 59 Vt. 104; *Cooney v. Hayes*, 40 Vt. 478; *Smith v. Atkins*, 18 Vt. 461; *Baxter v. Bush*, 29 Vt. 465; *Bellows v. Wells*, 36 Vt. 599; *Cooper v. Cole*, 38 Vt. 185; *Dickerman v. Ray*, 55 Vt. 65.

If crops thereafter to be grown can be conveyed by the owner of the land, and the land retained, the owner can retain the crops and sell the land. *Walworth v. Jenness*, 55 Vt. 670.

The opinion of the court was delivered by

ROYCE, Ch. J. The petition in this case was brought to foreclose the right of defendants in certain premises described in a warranty deed from the petitioner to the defendant Robbins, dated April 2, 1882, and all the right and title of the defendants in and to the crops raised upon said premises in the year 1887. Said deed was conditioned for the payment of four promissory notes, one for \$400, two for \$500 each, and one for \$800, signed by said Robbins, and made payable to the petitioner or order, with annual interest yearly thereafter, and contained a reservation of all the crops of every description that should be raised upon the premises described in it as security for the payment of the annual interest accruing on said notes. It was alleged in the petition, and admitted in the answer of the defendant Robbins, that there was interest due and unpaid upon three of said notes. The case was heard on the petition and answer. An agreement was made by the parties, and entered on the clerk's docket, that there was due

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on the notes December 20, 1887, \$1,644.27, and that there would be \$81.25 interest due on the 2d of April, 1888; and the decree made was that unless the defendants pay the petitioner the interest that will be due on the 2d of April, 1888, on or before the 3d day of April, 1889, with interest thereon from the 2d of April, 1888, they should be foreclosed of all equity of redemption in the crops named in the petition; and that unless they paid to the petitioner the residue due on said notes on or before the 3d of December, 1888, with interest thereon and costs of suit, they should be foreclosed of all equity of redemption in the real estate.

The defendants make no objection to the decree so far as the real estate is concerned, but insist that no decree should have been made foreclosing their right to the crops; that the only right that the petitioner had to them was based on the reservation made in the deed, and that the reservation being inconsistent with and repugnant to the grant is void.

The question of the right to reserve a lien on crops to be produced between lessor and lessee has been several times before this court, and has always been upheld. In *Baxter v. Bush*, 29 Vt. 465, an elaborate opinion was delivered by Judge ISHAM, in which he reviews the English and American cases, and states as the result that the doctrine is well settled that a party may transfer a title to crops though not then *in esse*, and which are to be grown upon the land, and the property will pass as soon as grown. See also *Smith v. Atkins*, 18 Vt. 461; *Cooney v. Hayes*, 40 Vt. 478; *Bellows v. Wells*, 36 Vt. 599; *Batchelder v. Jenness*, 59 Vt. 104.

That rule is controlling and decisive here, unless the fact that the petitioner has acquired his title by deed is to distinguish it; and we see no reason for making such a distinction.

Such a reservation is as much an abridgement of the grant in the one case as in the other. An exception or reservation is not void merely because, to some extent, it is inconsistent with the grant, unless by giving effect to it the grant would become wholly inoperative. Hilliard on Real Property, vol.

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3, p. 541 ; *Adams et al. v. Warner et al.* 23 Vt. 395 ; *Roberts v. Robertson*, 53 Vt. 690.

An easement, like a right of way, or to the use of water, has frequently been reserved in the conveyance of premises ; and it has never been understood that such a reservation was void on account of its being inconsistent with, or repugnant to, the grant.

By virtue of the reservation made in the deed, the petitioner acquired an equitable lien upon the crops that might be produced upon the premises as security for the payment of the interest that might accrue upon the notes described in the deed ; and the decree made was to enable him to realize upon that security.

The decree of the Court of Chancery is affirmed and cause remanded.

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## WINDSOR COUNTY, FEBRUARY TERM, 1888.

Present : ROSS, VEAZEY, TAFT and TYLER, JJ.

## VOLNEY S. FULHAM v. LESTER C. HOWE.

*Taxation. Evidence. Residence. Practice. Act of 1882,  
No. 2, s. 17. Act of 1884, No. 3.*

1. PRACTICE. In an action of replevin, where the verdict was for the defendant, if there was error in excluding evidence relating to damages, it is not available to the plaintiff.
2. EVIDENCE. PUBLIC DOCUMENTS. UNITED STATES CENSUS. The Compendium of the tenth Census, a book compiled pursuant to an Act of Congress, and printed at the government printing office, is admissible to show the population of a town, when it is a material fact.
3. TAXATION. LISTERS. JUDICIAL ACTION. The action of listers is judicial under the Act of 1882, No. 2, s. 17, when, after doubling the amount obtained, they make a further assessment of a sum "which will, in their judgment," make up the amount of the taxpayer's taxable property; and in an action of replevin to recover goods taken by a collector in satisfaction of a tax, evidence is not admissible to attack the assessment of the listers by showing that they had no facts on which to base it.
4. EVIDENCE. The inventory and affidavit used by the plaintiff before the listers were not admissible in his favor.
5. EVIDENCE. INTENTION. RESIDENCE. Evidence as to one's intention to engage in business in a particular place is not admissible to show his intention as to making that the place of his legal residence.
6. EVIDENCE. RESIDENCE. In an action against a tax collector, where it is material to show the plaintiff's residence, evidence is admissible to prove that he registered and voted in another state the same year of the assessment complained of, if coupled with an offer to prove that the laws of such state required a residence there of one year before voting.

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7. The court will pass upon an exception as it stands, though apprehensive that by inadvertence it does not present the question just as it came up in the court below.
8. Evidence is not admissible to show what measures the plaintiff took after the first of April, and without success, to have his name put on the New York City Directory.
9. The question being whether the plaintiff's domicile was in New York or in this State, there was no error in compelling him, on cross-examination, to state whether he paid any taxes in New York.

REPLEVIN. Plea, general issue, with notice that defendant would justify under a tax-bill and warrant directed to him as collector of taxes of the town of Ludlow. Trial by jury, December Term, 1887, ROYCE, Ch. J., presiding. Verdict for the defendant.

The tax in question was assessed in 1886. The plaintiff neglected and refused to make out and swear to an inventory of his personal property, for that year, as required by law, and the listers of said town then proceeded to make a list of his personal property, as required by law, where no inventory is filled out and sworn to. They found a note and watch belonging to the plaintiff, and about which there was no question made, and appraised the same at \$50, and doubled that amount; and this sum being, in the opinion of the listers, less than the amount of the plaintiff's taxable property, they further assessed him \$15,000 as the sum which in their judgment made up the amount of his taxable property, and added thereto his poll, at \$2.

The principal question was whether the plaintiff was an inhabitant of the town of Ludlow, for the purpose of taxation, on the 1st day of April, 1886. The plaintiff was unmarried, Ludlow was his native town, and the defendant's evidence tended to show that, since 1881, he had spent a large portion of the time in Ludlow, and that he made his home there; that he had only been absent from said town a month or two in each year, and that these absences included the 1st day of April in each year; that he had some articles of furniture that always remained in his room where he boarded; that he had no place



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of business in New York and had not paid taxes there since 1876.

It appeared that for more than twelve years prior to 1876 the plaintiff had resided in the city of New York, and had been engaged in the practice of law; that he kept an office there, that on the 8th of July, 1876, he came to Ludlow for the purpose of taking care of his father, who was then sick, during the the remainder of his life. He remained with his father until his death, and was made executor of his will. He gave up his office in New York in 1876, and had not been engaged in any business there since that time. His office furniture was sold, with the exception of a few articles, which had been stored in New York for him since that time. No question was made but what the plaintiff's residence was in New York prior to 1881. The question made was whether he had lost or abandoned that residence and had acquired one in Ludlow. The plaintiff introduced evidence tending to show that his coming to Ludlow was only for the purpose of caring for his father and settling his estate.

The witness Harpin, mentioned in the first exception, was the officer who served the writ, and was offered on a question of damages, expenses in finding the property replevied.

Seventh exception: "The plaintiff proposed to show that he registered and voted at New York, in the fall of 1886, and also that the law of New York would not permit a person to register and vote unless he had been a resident of the state for a full year previous to voting."

To this the defendant objected, and the court excluded the testimony.

Tenth exception: "After the plaintiff had testified that he had not paid taxes in New York since 1876, the plaintiff testified that previous to that time, he had paid taxes there; and thereupon the plaintiff's counsel asked the plaintiff the following question:

Q. And what did you do with reference to paying taxes in New York, so far as your property was concerned? A. This

question was objected to and excluded; and the plaintiff excepted."

The other facts are sufficiently stated in the opinion.

*W. E. Johnson and V. S. Fulham* for the plaintiff.

1. Harpin's testimony was admissible on the question of damages. The expense was caused by the defendant in taking and retaining the property. R. L. s. 1241.

2. The printed book, the Compendium of the 10th Census, was not admissible to show the population of Ludlow. It was not authenticated.

3. It was error to exclude the question asked Mayo, the lister, as to "what facts the listers ascertained, or had knowledge of," in reference to the plaintiff's property. Section 17, No. 2, Acts of 1882, is substantially like section 10, No. 78, of the Acts of 1880, except the power of assessment. Under the Act of 1880 it was held that "the listers should find property in specie." *Howes v. Bassett*, 56 Vt. 141. Listers in making an assessment act judicially. *Fuller v. Gould*, 20 Vt. 643; *Fairbanks v. Kittridge*, 24 Vt. 12.

All judicial acts must be based upon the consideration of evidence; and listers cannot form a judgment, such as is contemplated by the Act of 1882, except upon a personal knowledge of facts, or evidence admissible in courts of law, sufficient to establish the fact that the person assessed has taxable property to the amount assessed against him.

The legislature has directed the listers to act upon their "judgment." It is a substantial requirement, lying at the foundation of the right to make the assessment, and therefore a condition precedent; and, if they do not act upon their judgment, but act without judgment, the list is void. This is substantially held in *Henry v. Chester*, 15 Vt. 468; *Howes v. Bassett*, 56 Vt. 141.

As the listers act judicially in making assessments, they cannot be made personally responsible unless malice be shown. *Fuller v. Gould*, 20 Vt. 643.

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It follows, therefore, that when the listers do not act from malice in making an assessment, but make a wrong and erroneous assessment because they do not observe the requirements of the law, the party injured has no remedy except to defend against the collection of the tax.

4. It was error to exclude the evidence as to what the plaintiff's intention was in engaging in business at Ludlow. A person's residence depends largely on his intention.

The plaintiff's intention as to where he would engage in business was admissible as bearing upon what his intention was as to his place of residence. His intent was an essential element in determining the question of inhabitancy; and, without an intent so to do, he could not change it from New York to Vermont.

The doctrine is clearly stated in Story on Conflict of Laws, ss. 41, 44, 47; *Harvard College v. Gore*, 5 Pick. 374-377; *Hurlbut v. Green*, 42 Vt. 319; *Hulett v. Hulett*, 37 Vt. 581; *Leach v. Pilsbury*, 15 N. H. 138; *Doyle v. Clark*, 8 Rep. 164.

Residence cannot be established without intention; and the acts of the person, aside from the fact of his presence in the place, are only circumstances from which an intention may be inferred. In order to find a change of residence the trier of the case must find the fact of intention. Story on Conflict of Laws, s. 47, p. 57; *Harvard College v. Gore*, 5 Pick. 374; *Hurlbut v. Green*, 42 Vt. 319.

5. It was error to exclude the plaintiff's testimony that he registered and voted in New York. *Harvard College v. Gore*, *supra*; *Hulett v. Hulett*, 37 Vt. 581; 41 Vt. 495.

W. W. Stickney and M. H. Goddard, for the defendant.

1. The expenses of a suit, beyond the taxable costs, can never be recovered as *damages* in the same suit. *Rut. & Wash. Railroad Co. v. Bank of Middlebury*, 32 Vt. 639; *Harris v. Eldred*, 42 Vt. 39; *Earl v. Tupper*, 45 Vt. 275; *Hoadley v. Watson*, 45 Vt. 289.

The evidence is rendered immaterial by the verdict. *Frary v. Gusha*, 59 Vt. 257; *Robinson v. R. R. Co.* 7 Gray, 92; *Nones v. Northouse*, 46 Vt. 587.

2. The Compendium of the 10th Census was admissible; and that on the same principle as the Gazette is evidence of state matters in England, or state papers published under authority of Congress in this country. *Rex v. Holt*, 5 T. R. 436; Greenl. Ev. 491; *Watkins v. Holman*, 16 Pet. 25; *Bryan v. Forsyth*, 19 How. 334; *Gregg v. Forsyth*, 24 How. 179; *Radcliff v. Ins. Co.* 7 Johns. 38; *Whiton v. Albany Ins. Co.* 109 Mass. 24.

3. Under section 17, No. 2, Acts of 1882, the power of the listers to arbitrarily assess is judicial, and not open to examination either in the courts of common law or equity.

The courts of common law or of equity are powerless to give relief against the erroneous judgment of assessing bodies, except as they may be specially empowered by law to do so. *Cooley, Tax.* 748; *Gilpatrick v. Saco*, 57 Me. 277; *Wilson v. Wheeler*, 55 Vt. 446; *Bartlett v. Wilson*, 59 Vt. 23, 34.

The plaintiff elected to have his list made up in the way employed by the listers. He submitted himself to the "doom" of the listers. The right to discriminate against those who fail to hand in inventories or lists has often been judicially recognized. And it would seem that there can be no valid objection to it. *Boyer v. Jones*, 14 Ind. 354; *Cooley, Tax.* 358.

The taxpayer has had his day in court and his *due process of law* in the judicial character of the lister with his appeal to the board of civil authority, and the final resort of abatement if any wrong has been done. *Bartlett v. Wilson, supra*; *Hagar v. Reclamation Dist.* 111 U. S. 70.

4. The inventory of the plaintiff as executor of his father's estate is not admissible. *Wright v. Boston*, 126 Mass. 161; *Weld v. Boston*, Id. 166.

Declarations of a party are not admissible in his own favor. They are mere hearsay. Greenl. Ev. s. 108; *Thorndike v. Boston*, 1 Met. 242.

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5. The polls of male *inhabitants* of the State, etc., shall be set in the list. It makes no difference whether *such inhabitant* is in or out of business. Hence, his intentions as to whether he would engage in business in Ludlow or not were immaterial and incompetent. The plaintiff had a right, and was allowed to tell what he did and where he was.

6. The evidence as to whether plaintiff paid taxes in New York after he came to Ludlow in 1876 was rightly received. *Hurlbut v. Green*, 42 Vt. 316; *Mitchell v. United States*, 21 Wall. 350.

The opinion of the court was delivered by

VEAZEY, J. The exceptions are numbered in the bill of exceptions, and are taken up and numbered in the same order in this opinion.

I. If there was any error in excluding the testimony of Harpin, it is not available to the plaintiff by reason of the verdict for the defendant. *Frary v. Gusha*, 59 Vt. 257.

II. Public Acts, No. 3, of 1884, entitled, "An act relating to the grand list," provides, section 3, that the number of inhabitants of a town or city, for the purposes of this act, shall be deemed to be the number of inhabitants as returned by the United States census last completed before the making of the list.

The population of Ludlow in 1880 was a material fact to be proved. We hold that the printed Compendium of the 10th Census was legal evidence for this purpose. The book was compiled pursuant to an Act of Congress, and was printed at the government printing office at Washington. In *Watkins v. Holman*, 16 Wheat. 25 (Bk. 41 1. ed.), it was held that a volume of state papers showing the report of certain commissioners under an Act of Congress confirming the title in question, was admissible in evidence. It was put on the same ground as Journals of Congress and of state legislatures, and reports sanctioned and published by authority. As to the volume there in question the court said: "Now this original report, duly authenticated by the Treasury Depart-

ment, to which it was made, would be evidence, and it is evidence in the published volume. The very highest authenticity attaches to these state papers published under the sanction of Congress." To same effect is *Bryan v. Forsyth*, 19 How. 334, and other cases.

III. The listers of the town assessed the plaintiff \$15,000, under the authority of Act No. 2, sec. 17, of 1882, which contains this clause, viz. : " And if the sum obtained by doubling is, *in the opinion* of the listers, less than the amount of the taxable property of such person or corporation, they shall further assess such person or corporation for a sum which will, *in their judgment*, make up such amount."

The testimony of Mayo was offered for the purpose of attacking the judgment of the listers in making that assessment, the claim now being that the listers had no evidence upon which to base a judgment. The plaintiff admits, and even claims, that the listers acted judicially, and does not deny but that they were acting within the scope of their authority, but insists upon the right to upset their judicial act in this collateral suit.

We think this claim is against the settled rules of law. A judgment can be impeached only by a proper proceeding bearing directly upon the judgment itself to vacate and set it aside. *Porter v. Gile*, 47 Vt. 620.

When it is admitted, as it seems to us it must be under the terms of this statute, that the listers act judicially in making such further assessment, then the ordinary rules as to judgments must follow. *Fuller v. Gould*, 20 Vt. 643. But the aggrieved party in a case like this is not without remedy. He has notice of the assessment, and may appear before the listers to have his list corrected—section 21; and may appeal from their decision to the board of civil authority, and there be heard and have further corrections made—section 22. But there is no further statutory provision for relief. Resort to the common law courts can be had only according to the rules of law that pertain to the practice of those courts.

We hold that the ruling of the court excluding the testimony of Mayo was correct.

IV. The inventory of the plaintiff, and his affidavit which he used before the listers, were properly rejected on the ground that declarations of a party in his own favor are not admissible except as a part of the *res gestæ*.

V. A person's intention as to where he will have his legal residence has important bearing in determining its location. But his intention as to whether he would engage in business in a particular place would not tend to show what his intention was as to making that the place of his legal residence. This is the only ground now claimed for showing what the plaintiff's intention was in respect to engaging in business in Ludlow. We think it was properly excluded. It was an attempt to show what his intention was in a material respect, by offering to show what it was in an immaterial respect.

VI. Under point six the bill of exceptions is so meagre that a discussion of the ruling could not be of any value in another trial. It is obvious that the admissibility of testimony of the character offered would depend largely upon circumstances. It cannot be said that it would be inadmissible in every case. In this case it was admitted but its bearing restricted. There is not enough detailed to show that the restriction was not warranted.

VII. The plaintiff's offer to show that he registered and voted in New York in the fall of 1886, standing alone, should have been rejected; but the offer following in the clause in parenthesis, if proved, would have made the fact of registering and voting admissible, and so we think the offer as a whole as it stands in the exceptions was improperly rejected. *Mitchell v. United States*, 21 Wall. 350. This is so plain that it hardly warrants discussion, and indeed it is not denied by defendant's counsel. Their claim is that no such offer was made, and they urge the right to refer to the reporter's minutes in support of their claim. The exceptions say: "The reporter's minutes as to what the plaintiff testified to having been done

by him in New York in the matter of registering, voting and paying taxes may be referred to, and said minutes are to control when they conflict with what is said in the exceptions." It will be noted that this reference is to the *testimony* of the plaintiff, not to the plaintiff's offer of evidence. The *testimony* throws no light whatever on the point. Indeed, his testimony was excluded. We are therefore obliged to take the bill of exceptions as it stands on this point, although we are apprehensive that by inadvertence it may not present the question just as it came up in the court below.

VIII. Under point eight we think the ruling excluding the testimony offered was correct. The offer was to show that the plaintiff took measures sufficient, as he supposed, to have his name put on the New York City Directory for 1886, and what means he employed to that end. It seems he did not succeed, and all that he did was long after April 1st. It is not claimed that his right to have his name inserted in a subsequent directory depended on his legal domicile in April previous.

IX. It was held in *Hurlbut v. Green*, 42 Vt. 316, where the general question on trial was the same as in this case, that it was competent for the defendant collector to show that the plaintiff was not taxed in the town where he claimed his domicile was on April 1st. PROUT, J., there says: "Proof that the plaintiff had given in a list in Danville would have been admissible in support of his claim, and so would the *circumstance*, so to call it, that he did not, as affording an inference that it was unfounded, and that he so regarded it."

In *Hulett v. Hulett*, 37 Vt. 581, the issue was as to the domicile of the defendant. He claimed it was in Hampton, New York, and was allowed to testify that he never paid taxes any where but in Hampton. This was treated in argument and by the court as evidence that he paid taxes there, and was held admissible, without showing what the law of that state was on the subject of taxation, and on the ground that it had a tendency to show that the defendant considered that place to



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be his legal residence. The court said: "If the law of New York was such, or this property was of such character, or so situated, as to make that fact of no importance, it should have been shown by the plaintiff as an answer to this evidence."

In *Mitchell v. United States*, 21 Wall. 350, in his enumeration of the circumstances relied upon to establish an *animus manendi*, Justice SWAYNE mentions the payment of personal taxes. This plaintiff had been a resident of New York and exercised the rights of a citizen there for many years, and was claiming that he had made no change in his legal residence, and that his stay in Vermont was for temporary purposes only.

While the laws of states vary in the detail as to taxation, I have never heard of one where total exemption prevailed. The existence of such a haven of relief and joy could hardly fail to be a matter of universal knowledge. Owing to the universality of taxes we think the same rule should obtain where the domicile is claimed to have been on a given day in another state, as well as where it was claimed in another town in this State. Moreover, the explanation of the non-payment of taxes in New York would be more likely to be within the knowledge of the plaintiff than of the defendant. We think there was no error in the ruling under exception nine.

X. There is not enough stated under exception ten to show error in the ruling. If an offer had been made to show why the plaintiff had not continued to pay taxes in New York for the purposes of meeting testimony that he had ceased paying there, it would have presented a different question. But the question which was objected to, standing alone, was apparently immaterial.

Several exceptions were taken to the refusal to charge the jury as requested, and to the charge as given, but it is not deemed best to pass upon them, as they are not likely to arise in another trial, and do not involve propositions of general application.

Judgment reversed and cause remanded.

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Howard v. Howard.

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MARY E. HOWARD v. AUSTIN HOWARD AND WIFE.

[IN CHANCERY.]

*Mortgage. Trusts. Voluntary Settlement.*

When a mortgage is executed conditioned for the support of the mortgagee and his wife, and also for the payment of specified sums to his two daughters, the mortgagor and mortgagee cannot afterwards make a legal contract which injuriously affects the daughters, reaffirming *Sargent v. Baldwin*, ante, 17.

PETITION to foreclose a mortgage. Heard on the pleadings and agreement, December Term, 1887, ROYCE, Chancellor. Decree that the defendants pay the sums of money named in the petition or be foreclosed. The case is stated in the opinion.

*French & Southgate*, for the petitioner.

*T. O. Seaver*, for the defendants.

The opinion of the court was delivered by

TYLER, J. The facts alleged in the petition and admitted in the answer are in substance as follows: April 3, 1875, Abel Howard and his wife conveyed by deed certain tracts of land in Hartford to their son, the defendant, Austin Howard, who, with his wife, on the same day, executed and delivered to Abel Howard a mortgage of the same lands, conditioned, among other things, for the payment of \$100 annually to the mortgagee during his life, and for his and his wife's support during their lives, the payment of \$300 to the petitioner and

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\$150 to Hannah E. Squires, daughters of the mortgagee, within six months after the decease of the latter and his wife, and also to furnish the petitioner with a suitable room in defendant's house and a seat at his table whenever she claimed either of those privileges. The wife of the mortgagee died prior to January 21, 1884, and after her decease he desired to have an alteration made in the condition of the mortgage so that he might receive a larger annuity and thereafter maintain himself; and, accordingly, on said January 21, he and the defendant, without the consent or knowledge of the petitioner, made an agreement under their hands and seals by which the defendant undertook to pay him \$200 annually, and he undertook to release the defendant from his obligation for support and from all covenants and contracts which he held against the defendant. On the 23d of January, 1886, Hannah E. Squires sold and transferred her claim to the petitioner, who has ever since been the owner thereof. Abel Howard died prior to July 1, 1886, and more than six months thereafter, and after demand of payment of the defendant and his refusal, this suit was brought. The entire consideration of the mortgage and the covenants therein moved from Abel Howard. It also appeared that the defendant paid him, after the new contract was made, \$200 annually while he lived.

The opinion of the court in *Sargent v. Baldwin*, ante, 17, heard at the last General Term, is decisive of this case.

The decree is affirmed and cause remanded, with suggestion to the chancellor to cause other persons who may have an interest in the mortgage to be made parties to this proceeding if necessary for a final decree.

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Martin v. Hurlburt.

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OLIVER MARTIN v. JOHN HURLBURT AND RUTLAND SAVINGS BANK, TRUSTEE.

*Pension Fund. Trustee Process. Married Woman, Witness.* R. L. s. 1076. U. S. R. S. s. 4747.

1. A married woman is a competent witness in favor of her husband to testify to the terms of a contract, where the parties had no personal interview in making it, and she acted as the agent of both, of the defendant in carrying his proposition to her husband, and of her husband in carrying his acceptance to the defendant.
2. Under the U. S. Revised Statutes, s. 4747 and also the Revised Laws of this State s. 1076, a debt created by the deposit of a pension check, with a bank, or of the money received from it, is attachable on trustee process.

ASSUMPSIT. Trial by jury, December Term, ROYCE, Ch. J., presiding. Judgment for the plaintiff, and that the trustees were chargeable. The plaintiff's claim was for boarding the defendant and his wife. The plaintiff testified that he was a blacksmith and at his shop when his wife came to him at the time the contract was made; that the defendant was at the plaintiff's house about five rods from the shop; and that the arrangement between the parties was made by the plaintiff's wife. The plaintiff, on being asked what word he sent by his wife and what he told her, testified: "I sent by her to him that they might come. I told her to tell him to come, if she would put up with them, and he would pay me for their keeping. I had kept him long enough for nothing."

To the admission of this testimony the defendant excepted.

The plaintiff, in order to show a contract between himself and the defendant, introduced as a witness, his wife, and offered to show by her a state of facts, which, he claimed, constituted her the agent of her husband in making a contract

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with her father, to which the defendant objected, claiming that before she could be admitted as a witness she must have been proven to have been the agent of her husband, with reference to the matter about which she was to testify, and that this should be proved by testimony other than that of the wife herself, as a groundwork for the admission of the wife's testimony.

The wife was allowed to testify as follows :

Q. Mrs. Martin, you may state whether you made the arrangement which your husband directed you to make with your father? A. Yes, sir. Q. What was that arrangement? A. That arrangement was that father sent me to the shop to ask my husband if he could come back and live with us if he paid for his board. My husband said, yes, he could ; because he had kept him long enough for nothing ; if he calculated to pay for his board, he might come. Q. And you took that word right to your father? A. I did, sir.

It was agreed as to the trustee, that the defendant in November, 1886, went to the Rutland Savings Bank at its rooms, " and produced a check from the United States Pension Office, supposed to be pension money, for the sum of \$948.33, which he was then receiving ; of which check he wanted \$248.33 in currency, and the same was paid him by the bank. The balance of the sum, \$700, he deposited in said savings bank and took from it a deposit book, evidencing the amount of his deposit."

*Butler & Moloney*, for the defendant.

The plaintiff's wife was not a witness unless proved to be his agent ; and it is submitted that she was not such. R. L. s. 1005. He was practically present. *Estabrooks v. Prentiss*, 34 Vt. 457 ; 1 Best. Ev. 175. She was the defendant's agent. *Orcutt v. Cook*, 37 Vt. 519 ; *Town v. Lamphire*, 37 Vt. 56 ; *Goodrich v. Tracy*, 43 Vt. 220.

The statute evidently applies to transactions in the husband's absence, unless they are peculiarly within the line of the wife's duty. Cases, *supra*.

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“ Pension money kept as a fund, or invested for keeping and use as current circumstances may require, would not be subject to attachment by trustee process or otherwise in suits against the pensioner.” *Hayward v. Clark*, 50 Vt. 617.

This view is supported by both the majority of the court and the dissenting opinion in *Stockwell v. National Bank of Malone*, 37 Hun, 583; *Burgett v. Fancher*, 35 Hun, 647.

The pension check was “ sold ” to the bank, and hence it was not chargeable under the statute of this State. R. L. s. 1076; *White v. Capron*, 52 Vt. 634.

*Friend v. Garcelon*, 77 Me. 25, appears to be a leading case and will be relied on; but the court there held that the pension check would be exempt until the money actually came into the hands of the pensioner; that he could purchase exempt property which could not be reached by attachment.

*W. W. Stickney*, for the plaintiff.

1. The plaintiff’s testimony and his wife’s not only tended to show, but clearly established, the relation of principal and agent, and brings the case directly within the statute which removes the disqualification of the wife. R. L. s. 1005.

The fact that the husband was in his shop, near by his dwelling-house, when the arrangement was entered into by the wife as agent, does not militate against the authority of the wife to act and to tell what she did in respect thereto in court. *Lunay v. Vantyne*, 40 Vt. 501.

2. The trustee is chargeable. .

The case turns upon the construction of section 4747 of U. S. Rev. Stat. The case of *Haywood v. Clark*, 50 Vt. 612, does not settle the construction of this statute in this State, for the question was not before the court. The *obiter dictum* therein is not sound law, and has not been followed in the later cases.

The statute does not apply to moneys which have been paid to a pensioner and loaned by him. *Spellman v. Aldrich*, 126 Mass. 113; *Cranzv. White*, 27 Kans. 319; *Triplett v.*

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*Graham*, 58 Iowa, 135; *Jordain v. Fairton Sav. Fund Ass'n*, 44 N. J. 376; *Friend v. Garcelon*, 77 Me. 25; *Cavanaugh v. Smith*, 84 Ind. 380; *Faurete v. Carr* (Ind.), 9 N. E. Rep. 350; *Rozelle v. Rhodes* (Penn.), 9 Atl. Rep. 160.

A law of Congress which should exempt the pension money after it reaches the hands of the pensioner would be unconstitutional.

It was held in *Spindle v. Shreve*, 111 U. S. 542, that what property is exempt from execution is determined by the local laws where the property had its *situs*. *Frink v. O'Neil*, 106 U. S. 272.

The opinion of the court was delivered by

Ross, J. I. We think that the testimony of the plaintiff's wife was properly admitted. Two persons are necessary parties to a contract. The plaintiff and defendant had no personal interview in making the contract. The interview was conducted wholly through the plaintiff's wife, as an agent. As the agent of the defendant she took a proposition for a contract, to her husband. When she had delivered the proposition, she had accomplished the work committed to her agency by the defendant. The plaintiff could send his acceptance, or rejection, by the wife or some other person, or deliver it himself. He chose to employ the wife for that purpose. If he had employed some other person, no question would be made in regard to whose agent the other person was, in the transaction. The relation of the wife, in carrying back the acceptance of her husband, to the transaction, is as manifest, as though that were all she had had to do in consummating the contract. If she had been with her husband, and the defendant had sent some other person with the proposition, and the husband had sent his acceptance by the wife, no one would question that she was the husband's agent in accepting the offer. The confusion, if any, arises from the fact that she was the agent of both parties in making the contract, and from a failure to distinguish the point at which her agency for the defendant

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ceased, and that for the plaintiff began. But inasmuch as both the defendant and plaintiff must have participated in the transaction, the one in making the proposition, and the other in accepting it, and as the wife was the sole instrument, by which the proposition, and its acceptance were conveyed, it follows, that she must have been the agent of both in conveying the messages which concluded the contract, of the defendant to convey the proposition to her husband, and of the husband to convey his acceptance to the defendant. This is the only question now made between the plaintiff and defendant in regard to the latter's indebtedness. The judgment against the defendant for the amount found due by the jury is affirmed.

II. There are two bills of exceptions in regard to the trustees, one holding both trustees chargeable, and the other holding the Rutland Savings Bank chargeable. They are not inconsistent, but the latter seems unnecessary. As there are no facts tending to show that Trustee Watson had any funds belonging to the defendant, we are led to conclude the judgment against him was an inadvertence. The same is reversed, and judgment rendered that he is discharged with \$3.00 costs as agreed. It is contended that the funds in the hands of the Rutland Savings Bank belonging to the defendant, are exempt from attachment by the trustee process. First, that they are exempt, being a debt accruing from a pension granted the defendant by the United States, by force of Sec. 4747 U. S. Rev. Stat., which reads: "No sum of money due, or to become due, to any pensioner, shall be liable to attachment, levy or seizure by or under any legal or equitable process whatever, whether the same remains with the pension office, or any officer or agent thereof, or is in the course of transmission to the pensioner entitled thereto, but shall inure wholly to the benefit of such pensioner." This section does not purport to protect the money after it has inured wholly to the benefit of the pensioner, but to protect it while in the pension office, or in the hands of its agents or officers; and while in



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the course of transmission to the pensioner. The pension warrant had inured wholly to the benefit of the pensioner, in the case at bar. From it he had received, from the trustee, money, and a deposit credit. Hence when this trustee was summoned, the object of this section of the U. S. Rev. Stat. had been fully accomplished. Such is the purport of the decisions of courts of last resort which have had occasion to construe this section of the statute, as fully shown by the authorities cited by the plaintiff's counsel, except the case of *Hayward v. Clark*, 50 Vt. 612. In that case, the judge, who delivered the opinion of the court, went further than was necessary for the decision, and made statements in the closing paragraph of the opinion which support the views of the defendant's counsel. But what was there said was wholly unnecessary to the decision then made, and while, from the eminent source from which the views expressed came, worthy of careful consideration, yet it has not the force of a well considered decision involving the construction of this section of the statute. We are not prepared to adopt those views against the clearly expressed language of the statute, and the many well considered decisions to the contrary. The trustee must be held notwithstanding this section of the United States Revised Statute.

Secondly, it is contended that the trustee cannot be holden by reason of Sec. 1076 R. L. That section is: "No person, except as herein otherwise provided; shall be liable or chargeable on trustee process, on account of a sum due or owing to the principal debtor for property sold and conveyed or delivered by him, which was at the time of sale exempt from attachment and execution. But so far as the principal debtor, at the time the trustee process was commenced was the owner of other property of the same kind as that sold by him to the person summoned as trustee, exempt from attachment and execution, so far as such other property was free from incumbrance for the purchase money thereof, the provisions of this section shall not apply." This section was first enacted in 1865. Prior thereto for many years specific articles of property had been

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exempt from attachment and sale on mesne process, or an execution. Yet it had been repeatedly held that a debt created by the sale of such exempt articles was subject to attachment by the trustee process. *Edson v. Trask*, 22 Vt. 18; *Scott v. Brigham*, 27 Vt. 561; *Keyes v. Rines*, 37 Vt. 263. The last named decision was rendered in 1864. It is presumable that this section was enacted to avoid the effects of those decisions. Its language indicates it has reference to debts contracted from the sale of that class of property. The last sentence of the section which guards against the principal debtor acquiring the double advantage of holding a debt created in the manner indicated, and property purchased to take the place of the article sold from which the indebtedness of the trustee arose exempt, clearly indicates that this section only has reference to this class of exemptions. A pension bounty cannot well be brought within the provisions of the last sentence of the section. We do not think that this section was intended to, or does apply to a debt created by the deposit of a pension check, or money received therefrom. It would have been very easy for the legislature to exempt such debts from attachment by trustee process, if it so intended. But so far as appears, it has been content with the protection given to pensions by the U. S. Statute. In several instances—*Adams v. Newell*, 8 Vt. 190; 19 Vt. 544—an attempt had been made to attach the pension money while in the course of transmission to the pensioner. But there has been no specific legislation of the State in that behalf. If debts created from the loan of money received as pension, need protection from the trustee process, it is the province of the legislature to afford it. The indebtedness to the plaintiff in this case, having arisen, in part, in aiding the pensioner to procure the pension, and the remainder in supporting him and his family, no hardship is incurred if this fund given by the general government mainly for the support of pensioner and his family, is used for its payment. The judgment of the County Court is affirmed against the trustee, the Rutland Savings Bank.

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Thompson v. Churchill.

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## ARTHUR THOMPSON'S ADMINISTRATOR v. JULIA A. CHURCHILL'S ESTATE.

*Will and Codicil, Construction of.*

A will and codicil form one instrument and are to be construed together; thus, an additional bequest in a codicil is subject to the conditions of a clause of survivorship in the will to the same legatee, where no repugnancy is created by such a construction.

APPEAL from a decree of the Probate Court for the District of Hartford. Heard by the court, December Term, 1887, ROYCE, Ch. J., presiding. Judgment that the decree of the Probate Court be reversed and that the legacy named in the will and codicil be paid to May Thompson.

Maria F. Johnson was executrix of Mrs. Churchill's will and Lewis Pratt was administrator of Arthur Thompson's estate.

The will and codicil in contention were as follows: "I give and bequeath to my daughter Maria, the use during her life, or if she should marry, so long as she remains unmarried, of all my property, real and personal, she to pay all taxes, and for suitable repairs thereof without any charges against said property. I give and bequeath the remainder, upon the death or marriage of said Maria, to my four grandchildren in equal portions. The portion to which the children of my daughter, Delia (lately deceased), shall be entitled, is to be vested in a trustee, or trustees, to be appointed by my daughter Maria; or, in case she fail to make such appointment, by the Probate Court for the Hartford District, said trustee, or trustees, to hold and use the same in entire and absolute exclusion of their father for the exclusive benefit of said last-named children, and the survivor of them. In case one of said children of Delia should die the portion to which said child

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would be entitled if not dead is to go and belong to the survivor, and in case both should die anything remaining of the portions given hereby to said children of Delia is to go to and belong to the issue of them as heirs taking by inheritance. If there should be no issue thus to take then such remainder is to go and belong to the children of said Maria in equal portions, and their respective heirs. The said Maria is authorized in her discretion to use of said property for the benefit of any of said four grandchildren as they may need, the same so used to be charged to and reckoned as part of the equal portion above named. Said Maria is authorized at any time to make or cause to be made a division of said property, upon sale or other lawful mode, among said grandchildren according to the foregoing provisions."

Codicil: "By way of codicil to the foregoing will in alteration of and in addition to the same I give and bequeath to the said children of Delia, in equal shares, my bank stock in the Woodstock National Bank, and the barn owned by me, or in lieu of said barn \$300 in money, the dividends on said stock and the rent of said barn, or the interest on said \$300 to be deposited in the Savings Bank in Woodstock in their separate names, for them, under the control of my daughter Maria as trustee, there to accumulate for them until they respectively become twenty-one years old, when each is to have an equal share of the same, said Maria being authorized to use any part or all of it for them, if in her judgment necessary. If said Maria should die before said children of Delia should become twenty-one years old, the said principal named in this codicil is to be equally divided between my surviving grandchildren."

The Probate Court decreed as follows:

"Now, pursuant to the provisions and terms of said will, said court decrees said real estate and household furniture and safe to the said Maria F. Johnson during her life, with remainder as is provided in said will.

"And said court further orders and decrees that said executrix do assign and transfer one-half of; to wit, ten shares of said Woodstock National Bank stock to May Thompson, one of the children of Delia Thompson, a daughter of said testatrix; and further that said executrix do pay over to said May one-half of; to wit, \$150 of said \$300 fund, and one-half of; to wit, \$200.775 of said residue of \$401.55.

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“ Said court furthermore orders and decrees that said executrix do assign and transfer to the administrator of Arthur Thompson late of said Woodstock, deceased, the other child of said Delia, the remaining ten shares of said bank stock, the remaining half of said \$300 fund, and the remaining half of said residue of \$401.55 : to wit, \$200.775. All the foregoing is made pursuant to the terms of said will.”

May Thompson appealed, objecting to said decree as follows :

“ She objects to the legacy given by said will and codicil to her brother Arthur Thompson, deceased, being decreed to the administrator on his said estate, as was done by said Probate Court, and claims that the same should have been decreed to her as is provided in said will and codicil ; and further that said Probate Court erred in the construction they gave to said will and codicil, and did not follow the wishes and intentions of the said Julia A. Churchill, as the same were expressed in said will and codicil, in the decree made, making a distribution of said estate.”

Arthur Thompson deceased after the death of his grandmother, Mrs. Churchill, and before the distribution of her estate.

*Norman Paul*, for the defendant.

The Probate Court, in making distribution of the estate, treated the additional legacies named in the codicil as independent, thus wholly disregarding the intent of the testatrix, as expressed in the will.

A codicil forms a part of a will ; its use is generally to modify or vary its terms, and does not revoke it unless it is expressly stated that it is made for that purpose.

In *Redfield on Wills*, vol. 1, 288, the learned author says : “ It is a clear principle of the English and American law that all codicils, however numerous, are to be regarded as parts of the will, and all, together with the will, are to be considered as one instrument.”

In *Barnes v. Barnes*, 55 Vt. 317, Chief Justice ROYCE says : “ A codicil is regarded as a part of the will ; and the

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will and codicil are to be construed as one instrument; and a codicil should be so construed, if it can be fairly done, as to make it harmonize with the purposes declared in the body of the will."

The same doctrine is held in *Jarmon on Wills*, vol. 1, p. 27, note; *Ward v. Ward*, 105 N. Y. 68; *Lynch v. Pendergast*, 61 Barb. 501; *Westcott v. Cady*, 5 Johns. Ch. 334; *Crowden v. Clowes*, 2 Ves. Jr. 449.

An additional legacy is subject to all the conditions attached to the previous legacy, unless there are express words to the contrary. *May v. May*, 19 Weekly Reporter, 432; 1 Jar. Wills, 354.

There are no such words in this codicil. If the will and codicil are to be construed as one instrument, it is clear that the decree of the Probate Court was wrong.

Arthur Thompson, one of the children of the testatrix' daughter Delia, having died, the legacy bequeathed to him should go to the appellant, May Thompson, as survivor by the terms of said will.

The intent of the testatrix should be followed in construing this will and codicil. *Richardson v. Page*, 54 Vt. 373.

*W. E. Johnson and French & Southgate*, for the plaintiff.

It is presumed that the decree of the Probate Court is correct unless the contrary appear. The distribution was legal.

As to the specific property named in the codicil, the bank stock and the barn, the terms of the codicil are entirely *different and inconsistent* with the terms of the will. By the will there was a general bequest to the four grandchildren of Mrs. Churchill; the portion given to the two children of Delia, deceased, was to be vested in trustees "for the exclusive benefit of the last-named children, and the survivors of them." In case one died his or her share was to go to the survivor. If both died the portion remaining was to go to their issue, or, if none, to the children of Maria. The trusteeship was to remain during the life of either or both of Delia's children.

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There was no provision that at any time it was to be paid to them, and was not to be distributed until the death of the survivor.

By the codicil a portion of the property, by specific bequest—the bank stock and barn, or avails of sale of barn—was given absolutely to the children of Delia, “in equal shares.” The dividends on the stock and rent of barn, or interest on avails, were “to be deposited in the savings bank in Woodstock, in their separate names, for them, under the control of my daughter, Maria, as trustee,” and there to accumulate until they each become twenty-one years of age, when they were to have equal shares. The codicil recites that it was in “alteration of and in addition to” the will. The will and codicil cannot both be carried out. Either there is a perpetual trusteeship, or this property goes absolutely to the children of Delia. The property must be distributed under the codicil, as ordered by the Probate Court.

If the property was to be distributed under the terms of the will, the County Court erred in distributing it directly to May Thompson. It should be decreed to the trustee provided for by the will. Very little aid can be gained on the question by decided cases.

In England it has been held that a legacy given to A for life, with remainder over, and another legacy given to A in addition to the first legacy, the latter will be construed as an absolute gift. 1 Jar. Wills, 354.

Where legacies given by will were to be paid free from legacy duty, and the testators by codicil gave to the husband of one of the legatees, who had died, an equal legacy “instead” of the legacy to his wife, it was held by Lord ELDON that this legacy was not within the exemption. 1 Jar. Wills, 357; *Burrows v. Cottrell*, 3 Sim. 375; *PHELPS, J., Hibbard v. Hurlbut*, 10 Vt. 173.

The opinion of the court was delivered by

Ross, J. The contention is whether the survivorship clause,

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in the will, between the children of the daughter, Delia, is to be applied to the additional gift to the same children made in the codicil of the will. The will and codicil form one instrument, and are to be construed together. The intention of the testatrix, as gathered from the whole instrument, is to control. At the time the will was made the daughter, Delia, had deceased. The testatrix, in making provision for her two children was careful and explicit in excluding the father of the children from participating in her bounty under any circumstances. She carefully provided that if one should die the survivor should take the portion of the deceased child, and that if both should die their share should go to their issue as heirs taking by inheritance, and if no such heirs should then exist it was to go to the other grandchildren. She placed the property in trust to accomplish these purposes. Nothing can be clearer than the intention of the testatrix to exclude the father of these children from participating, on any contingency, in the devise to the children, when the original will is considered by itself.

By the codicil the testatrix takes a portion of the estate which would have been divided among all the grandchildren by the will, and gives it in trust for the two grandchildren by the deceased daughter, Delia, until they arrive at the age of twenty-one years, and then orders it to be divided between them, with the condition that if the other daughter, Maria, should die before they arrived at the age of twenty-one years, then the portion of the estate set apart for these grandchildren by the codicil should be divided equally between the surviving grandchildren. This latter was in substance the provision of the original will. If the provision of survivorship in the original will is to apply to this additional provision for the same grandchildren in the codicil, then the clearly expressed exclusion of the father in the original will, will prevail. The son deceased before the division. If the survivorship provision of the will does not apply to the additional provision for the same legatees in the codicil, the clearly expressed exclu-



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sion of the father in the will will be abrogated in regard to the bequest in the codicil. We do not think there can be any doubt of the intention of the testatrix to exclude the father absolutely from taking any benefit under or from the will. The intention when once ascertained from the provisions of the whole will is to prevail.

There is no repugnancy created in enforcing the expressed exclusion of the father by applying the clause of survivorship in the will to the bequest in the codicil. It is a general rule that a further bequest to a legatee or legatees, by way of codicil, if expressed to be an additional bequest, is subject to the conditions, limitations and provisions of the bequest to the same legatees in the will unless making application of the conditions, limitations and provisions of the bequest in the will to the additional bequest in the codicil will create a repugnancy in some of the provisions of the whole will, as found in the will and codicil, or will in some way contravene the manifest intention of the testator, ascertained by considering the entire provisions of the will. No such repugnancy or contravention will arise by making the application in this case, but rather the application will fully carry out the intention of the testatrix in regard to the father, and a failure to make it will defeat such manifest intention. We think that the survivorship clause in the will applies to the additional bequest in the codicil.

The judgment of the County Court is affirmed and ordered to be certified to the Probate Court.

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Williams v. Moliere.

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JAMES H. WILLIAMS v. JAMES W. MOLIERE AND  
WIFE.

*Will. Trustee. Powers, by whom may be exercised.*

R. L. s. 2291.

1. Discretionary powers given to a trustee in a will, and also expressly given to *his heirs*, may after his decease be exercised by his heirs.
2. In such case all the heirs should be appointed trustees.

APPEAL from the decree of the Probate Court for the District of Windsor. Heard by the court, December Term, 1887, ROYCE, Ch. J., presiding. Judgment *pro forma* and without hearing that the decision of the Probate Court be affirmed.

The petition to the Probate Court was in substance as follows: That on the 25th day of January, 1855, the will of Thomas Robinson was duly approved and allowed, which will, after providing for certain legacies and bequests therein named, further provided as follows, viz.:

“The rest and residue of all my estate, both real and personal, remaining at my wife’s decease after paying the afore-said legacy of \$2,000 to my adopted daughter, and fulfilling the other provisions of this will, I give, devise and bequeath to James H. Williams, of Rockingham, in the County of Windham, and to his heirs upon the trust, and for the uses and purposes and with the powers hereinafter declared, expressed and given in relation thereto. That is to say, upon trust that he, the said James H. Williams, shall hold, manage and improve the residue of my estate hereby devised to him for the use and to the best advantage of the said Abby Deming or Abby D. Robinson and her children (if she should marry and become the mother of children), and pay over to her from time to time during the term of her natural life as her wants and

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convenience may require ; and upon her own personal request and receipt only, all and singular the rents, profits, income and interests whatever arising from said trusts estate, after deducting therefrom a fair and reasonable compensation for all time and expenses spent and incurred by him in and about the due execution of this trust. And upon the further trust that if the said Abby should marry and have living issue, then and in such case the said James H. Williams may, and he is fully authorized and empowered to convey, make over and deliver to the said Abby, upon her own personal receipt only, the whole or any part of the said residue or trust estate, if he should, in his own sound discretion think it prudent, proper, and for the best interest of the said Abby so to do, in which case the said Abby's receipt shall be his full and sufficient release and discharge therefor.

“ And upon this further trust that the said James H. shall, upon the decease of the said Abby convey, deliver and pay over all the said trust estate and the income and increase thereof remaining in his hands unexpended and unconveyed and unpaid to the said Abby to the several persons and in the several proportions following: that is to say, to the children of the said Abby (if she should have children) one equal quarter part thereof; to Hannah Harris \* \* \* one equal quarter part thereof; to Henry Hutchinson, etc. \* \* \* provided always that the said Williams shall be entitled to receive from said trust estate a fair and reasonable compensation for his services and expenses in and about the same before distribution shall be made.

“ And if said Abby shall die during the lifetime of my wife, then I give, devise and bequeath all the residue of my estate, real and personal, of whatever name or nature remaining undisposed of and unexpended by my wife at the time of her death to the several persons to whom I have directed the said Williams to convey and pay over the residue of the trust estate which might remain in his hands upon the decease of the said Abby in case she should survive my wife, as is hereinbefore provided, upon the same contingencies and in the same proportions, and so to their respective heirs forever.”

The will was dated January 25, 1853.

“ Your petitioner further shows that at some time prior to January 17, 1865, said Polly Robinson, wife of said testator,

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died, and upon her decease then came into the hands of said James H. Williams, as trustee under said will, the sum of \$5,201.38 in personal estate, together with forty shares in the capital stock of the National Bank of Bel lows Falls; that said James H. from time to time paid over to said Abby D. all the rents, profits and income of said trust estate up to the first day of July, 1881; and in the exercise of the discretionary powers vested in him by said will, from time to time paid to said Abby the sum of \$3,000 out of the principal of said trust estate, taking her notes for that amount, payable to him as such trustee, but that such payments were intended and understood to be unconditional, and not as loans to be repaid by said Abby, and said notes were taken as a matter of convenience to himself, and not as evidence of indebtedness by said Abby to him as such trustee; that some time prior to the payment of said sum of \$3,000, or any portion thereof, to said Abby, she was married to one James W. Moliere, now of San Francisco, California, and had children by said marriage, named Florence E. and James V. Moliere, who are infants, and are living with their mother at San Francisco.

“ Your petitioner further shows that on the 13th of August, 1881, said James H. Williams died, and that at the time of his death there remained in his hands as such trustee said forty shares of bank stock and about the sum of \$2,200 in other property and securities and said promissory notes; and that on the 3d day of October, 1881, upon application for that purpose, and due notice given, your petitioner was appointed trustee under said will in the place of said James H. Williams, deceased, by the Probate Court for the said District of Windsor, and received as such trustee the sum of \$2,261.53 in personal claims, said forty shares of bank stock, and said promissory notes; that he has paid said Abby the income of said trust estate, as the same has accrued and become payable, except so much thereof as has been necessary to pay the reasonable expenses of the petitioner in and about the due execution of said trust; and that said Abby has from time to time applied to your petitioner and represented that she was in need of all, or a portion of the principal of said trust estate, and requested the petitioner to pay to her portions of such principal, and claims that the petitioner, as such trustee, may so exercise the discretionary power lodged in said James H. Williams as trustee named in said will. \* \* \*

“ Your petitioner further represents that it is claimed by

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several of the parties interested in said trust estate, adversely to said Abby D. Moliere, that he has no authority or right to pay said Abby any portion of the principal of said trust estate, or in any way to exercise the discretionary power in relation thereto lodged in said James H. by the terms of said will.

“ The petitioner further represents that he is of the opinion that circumstances have already arisen, or may soon arise, when it will be prudent, proper, and for the best interests of the said Abby, to convey to her a portion or all of said trust estate, but that in view of the conflicting claims of the various parties in interest above set forth, he is in doubt as to his right so to do. Wherefore your petitioner prays that this honorable court may take cognizance of the matters herein set forth, and that he may be authorized and directed to return to said Abby said promissory notes so given by her to said James H. Williams, deceased; and that the amount so paid her by said James H., for which notes were given, be credited the petitioner in his account, and treated as payments made by said James H. by virtue of the discretionary power given him under said will; and that a decree be made and entered by said court which shall define and declare the rights and powers of the petitioner concerning said trust estate.”

It was agreed that the facts alleged in the petition were true, and that James H. Williams, the present trustee, was a son and one of the heirs-at-law of James H. Williams, Sr., the original trustee. The Probate Court decreed that the promissory notes given by Abby D. Moliere to James H. Williams, the former trustee, be given up to the said Abby D. by the trustee, and that the amount so paid to her, for which said notes were given, be credited the petitioner in his account, and treated as payments made by said James H. by virtue of the discretionary power given him under said will; secondly, as to so much of the principal of the trust fund as now remains in the hands of the trustee, that the same remain in the hands of the trustee, the income thereof to be applied during the lifetime of said Abby D. to her benefit as stipulated in and by the provisions of the will of Thomas Robinson, and that upon the death of the said Abby D. the same be paid over by him or his successor to the lawful representatives of

the persons named by the said testator, Robinson, as residuary legatees of said trust funds, the court holding that the discretionary power vested in the original trustee does not by law vest in his successor, and that his successor has only power to pay over the income of the trust fund, the surplus of the principal not paid over by the original trustee under exercise of his discretionary power lapsing into the residuum of the estate.

*L. M. Reed*, for the petitioner.

The question is as to the powers of the trustee. The power given to James H. Williams is a mere naked power. It is not coupled with any trust in favor of said Abby so far as relates to the subject-matter of the power. Hill, Tr. p. 70; *Beck's Appeal*, 8 Cent. Rep. p. 99. The confidence reposed in the trustee was strictly personal, and rested in the exercise of his own "sound discretion." Mere powers are discretionary with the donee, and he may or may not exercise them. Perry, Trusts, s. 507; Hill, Tr. 486.

"So these powers can be exercised only by those persons to whom they are expressly confided by the trust instrument; and they will not devolve upon the heir or personal representative of the original trustee, unless they are so limited on the creation of the trust, and where the authority is given to co-trustees without words of survivorship it will be determined on the death of one. So trustees appointed by the court cannot usually execute powers of this nature." Hill, Tr. 488; Perry, Trusts, ss. 496, 497.

Where the consent of any person is required to the execution of a power the condition must be strictly complied with; and if the person whose consent is necessary dies before the execution of a power, and without having assented, the power is gone. *Paroles v. Jordan*, 62 Md. 499-504.

The statute does not apply to discretionary trusts. Perry, Trusts, s. 500; *Taintor v. Clark*, 15 Met. 220; *Greenough v. Welles*, 10 Cush. 471; *Bradford v. Marks*, 132 Mass.

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407; *Conklin v. Edgerton*, 21 Wend. 430. The decree of the Probate Court should be affirmed in all respects.

*W. C. Dunton*, for Moliere and wife.

The present trustee has like power and authority to exercise the discretion given to his father by the will. The statute—R. L. ss. 2291-2—provides that when a trustee dies before the object for which he was appointed is accomplished, and where no adequate provision is made by the will to supply the vacancy, the Probate Court may appoint a new trustee; and the *trustee so appointed* shall have the *same authority* as if appointed by the testator. *Nugent v. Cloon*, 117 Mass. 219; *Bradford v. Monks*, 132 Mass. 405; *James Schouler, Petitioner*, 134 Mass.

A court of chancery, independent of the statute, will, in certain cases, exercise a discretionary power confided to a trustee, as in this case. *Bull v. Bull*, 8 Conn. 47; *Williams v. Townshend*, 33 N. J. 393; *Bacon v. Bacon*, 55 Vt. 243; *Underhill on Trusts*, p. 262, *et seq.*

The trustee in this case should be authorized and directed to exercise the discretion by conveying and delivering the trust property to the *cestui que trust*, Mrs. Moliere.

The will clearly shows that it was the intention of the testator that this trust should be executed for the benefit of the said Abby, and even in the absence of a statute like ours a court of equity never allows a trust to fail for the want of a trustee. *Tower v. Clark*, 13 Met. 231.

The opinion of the court was delivered by

VEAZEY, J. The counsel for the petitioner claims that the power conferred on James H. Williams, the trustee named in the will, to convey, make over and deliver to Abby Deming the whole or any part of the trust estate, in his discretion, was personal and limited to him, and did not extend to his successors, and this on the ground that such powers can be exercised only by those persons to whom they are confided by the trust

instrument. We arrive at a different result even under the rule which is invoked. The devise was to said Williams, "and to his heirs upon the trust, and for the uses and purposes and with the power hereinafter declared, expressed and given in relation thereto." Not only the trust goes to the heirs, but the power also. Following the above quotation are the clauses directing as to the trust and defining the discretionary power, and in those clauses only the name, James H. Williams, is used; but it is perfectly clear that such mention of his name was not intended as any restriction or limitation upon what preceded, but was used as a mere convenience in defining both the trust and the power reposed, in the previous clause, not only in him but in his heirs. This discretionary legal power was in that clause as expressly given to the *heirs* as to Williams; and where such power is given to heirs it can be exercised by them.

It was early settled that a power could be given to an unknown person or class, as to the heirs of a living man, after his death. 1 Sugden on Powers, p. 148. The author says: "There is a necessity for trusting persons who cannot be personally known, in order to effectuate men's intentions in the exercise of that dominion which the law gives them over their properties. There is nothing absurd in trusting persons not known; nothing incongruous or repugnant to the rules of law."

In reply to the objection that the power may devolve on infants, idiots or lunatics, or such a number of female heirs as will make their agreement very improbable and equivalent to a disability, Mr. Sugden says: "This is an objection to authorities coupled with interests, as well as to mere naked authorities; the disability is the same, but it is no reason against creating such a power, that by accident it cannot be exercised." The author cites Wilmot, notes, 36. In *Cole v. Wade*, 16 Ves. 27, the devise and bequest were to two trustees named, their executors, administrators and assigns. The disposition contained a mixture of trust and power. The Master



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of the Rolls, Sir WILLIAM GRANT, said: "Though it seems very incongruous and inconsequential to extend to unknown and unascertained persons the power which personal knowledge and confidence had induced the testator to confide to his original trustees and executors, yet I am not authorized to strike these words out of the will upon the supposition, though not improbable, that they were introduced in this part by inadvertence and mistake. I do not apprehend that a bequest actually made, or a power given, can be controlled by the reason assigned. The assigned reason may aid in the construction of doubtful words; but cannot warrant the rejection of words that are clear." In that case there was a question as to the effect of the words, which does not exist in the case at bar.

This trustee named in the will is dead, and this petitioner is one of his heirs and has been appointed trustee; but there are other heirs, therefore they should also be appointed trustees. Upon this construction of the will there is no occasion for invoking the aid of our statutes applicable to the case of the appointment of new trustees. Sections 2291-2 R. L.

No question is or could properly be made but that the first branch of the decision of the Probate Court was correct, which related to certain notes which said Abby Deming gave the trustee. But as to the second branch there was error.

The judgment of the County Court is therefore reversed, with costs to the defendants to be paid out of the trust funds; to be certified to the Probate Court.

## ROLLIN AMSDEN v. FLOYD &amp; BLAISDELL.

*Pleading. Sale. Landlord and Tenant. R. L. s. 1932.*

1. A statement in exceptions that a certain fact *appeared* is equivalent to stating that there was no controversy in regard to it.
2. The defendants in May, 1885, commenced under a parol lease to occupy the the plaintiff's premises at an agreed rent of \$45 per month, and in March, 1886, he notified them that if they continued after that month they must pay \$60 per month; *Held*, that the tenancy was one at will under the statute,—R. L. s. 1932,—and that the said notice terminated it; and that the plaintiff was entitled to recover \$60 per month after March, 1886, on an implied promise.
3. A tenant at will, after notice to quit, has a reasonable time to vacate the premises and procure other accommodations, depending upon the circumstances.

ASSUMPSIT with count for use and occupation. Trial by jury, May Term, 1887, Walker, J., presiding. Verdict and judgment for the plaintiff to recover \$1090.43.

The plaintiff's evidence tended to show, and was uncontradicted, that he leased the premises to the defendants for the storage of a large quantity of machinery. The attorney of the defendants admitted that they should pay \$45 per month to the commencement of the suit. The only question in dispute submitted to the jury, was whether after March 31, 1886, the rent should be increased to \$60 per month.

There was no evidence before the jury tending to show that the defendants ever agreed to pay said rent of \$60 per month unless the same is implied by law by their continuing in possession after receiving said notice.

It appeared that the defendants and one Harlow as co-trustees of Jones, Lamson & Co., and their creditors, jointly occupied the premises and that R. L. Jones, acting in behalf of the trustees, made the trade shortly before May 13, 1885. The plaintiff testified that Jones came to see him on what

terms the machinery could remain "there for a time, not to exceed six months." \* \* \* "I told him after a little talk that it could remain there on the same terms that it had remained,—the same terms that Jones, Lamson & Co. had paid me from December 10, 1884." The court charged the jury in part: "Under that arrangement these defendants were to pay \$45 per month, the understanding being that the probable occupancy would not exceed six months, and they went into possession under that contract. They paid no rent, and they have occupied the premises from that time down to the present. Prior to the 1st of April, 1886, Mr. Amsden gave notice to the defendants that, if they remained and occupied the premises after the 1st of April, 1886, they must pay him \$60 per month. These notices are in evidence some of them, and you have heard the proof.

"I charge you in accordance with the request of the plaintiff that these defendants remaining in the possession and occupancy of that property after the 1st of April, 1886, under this notice that they should pay \$60 per month if they remained after the first of April, the law implies a promise on their part to pay \$60 from the 1st of April down to the time plaintiff seeks to recover, 13th November, 1886."

*Wm. Batchelder*, for the defendant.

The law does not imply a promise to pay increased rent from the bare fact that the defendants remained in possession after notice of increase of rent after a certain time.

The fact that they continued in possession, by itself proves nothing positively. It was a circumstance proper to be submitted to the jury to be considered by them in connection with all the other evidence in the case.

The fact of assent or making no objection was just as essential to be proved by the plaintiff as the fact of continuing in possession. The court will not presume that defendants assented or made no objection, especially when it finds them objecting to and resisting the claim.

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The court should have submitted the case to the jury to find the facts from all the evidence before them. *Whitney v. Sullivan*, 7 Mass. 107.

The notice of increase of rent was invalid. It was an attempt to raise the rent during the term. The original lease was for six months. Defendants held over with consent of plaintiff, and hence were holding for another term of six months, which would not expire until May 13th, 1887. A tenant, holding over after the expiration of his lease, even though but for a short time by permission, is in on the conditions and for the term of the original lease.

A tenancy "from year to year" will be inferred by a holding over after the expiration of the term by permission of the landlord. 4 Wait Act. & Def. 203, citing *Jackson v. Salmon*, 4 Wend. 327; *Right v. Darby*, 1 Term, 162; *Kelley v. Patterson*, 43 L. J. C. P. 320; *Conway v. Starkweather*, 1 Denio, 113.

A month's notice was necessary. 32 Vt. 39; 43 Vt. 172; 1 Wash. Real Prop. 291, 383, 387.

*Davis & Enright*, for the plaintiff.

There was no error in the charge of the court, that the law implied a promise to pay \$60 per month by the defendants after April 1, 1886, in view of the notice given them by the plaintiff. The written notices terminated the old lease at \$45 per month, and it was the duty of the defendants to vacate unless they impliedly promised to pay the increased rent. It would be a fraud upon the plaintiff to hold otherwise, when the defendants gave no dissent, but stood silently by and saw him making repairs made necessary by their continued occupancy. In numerous cases the law implies a promise from the circumstances. *Paddock v. Kittridge*, 31 Vt. 378, 384; *Ives v. Hulet*, 12 Vt. 314, 327. There is "a sort of moral estoppel," applied in such cases, says BENNETT, J., in *Ives v. Hulet*, *supra*. See 1 Par. Cont. 476; *Gilson v. Bingham*, 43 Vt. 410, 415; *Kellogg v. Denslow*, 14 Conn. 411; *Boughton v. Standish*,

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48 Vt. 594; *Esty & Dutton v. Read*, 29 Vt. 278; *Callender Co. v. Marshall*, 57 Vt. 235.

But this very question has been decided by the courts; and it is held that if a tenant holds over after the expiration of the lease, when the landlord had notified him that if he retained possession he must pay a higher rent, he is deemed to have assented to pay the increased rent. *Hunt v. Bailey*, 39 Mo. 257; *Binkley v. Walcott*, 10 Heisk. 22; *Crigsby v. Fullerton*, 57 Mo. 309; *Mack v. Bent*, 5 Hun, 28; *Despan v. Walbridge*, 15 N. Y. 374; *Roberts v. Hayward*, 3 C. & P. 432; 14 E. C. L. 381; Wood, Land. & L. s. 13.

The opinion of the court was delivered by

TAFT, J. Some questions of evidence are presented by the brief for the defendants. We do not consider any question of that kind open, as they relate to the subject of notices to the defendants of an increase of rent, although they are stated in the exceptions, for they are accompanied by the statement that “*it appeared \* \* \** that in March, 1886, plaintiff notified the defendants, and said Harlow, that if they occupied said premises after April 1, 1886, they must pay therefor a monthly rent of sixty dollars.” Although these evidentiary questions are stated in the exceptions, it is presumed that the result of the whole evidence left the case as stated in the clause setting forth what appeared upon trial. “A statement in exceptions that a certain fact appeared, is equivalent to stating that there was no controversy in regard to such fact.” *Noyes v. Rockwood*, 56 Vt. 647.

The remaining question is upon the charge of the court.

This action is assumpsit for the occupation of premises, used for storing a quantity of machinery. It was conceded that the relation of landlord and tenant existed. The lease was by parol, beginning on the 13th of May, 1885, at an agreed rent of forty-five dollars per month, payable monthly. The plaintiff notified the defendants in March, 1886, that, if they occupied the premises after that month, they must pay sixty

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dollars per month rent. They continued in possession. The court ruled, as matter of law, that the plaintiff was entitled to recover at that rate after March, 1886. The tenancy, under section 1932, R. S., was one at will. It had not ripened into one from year to year; for the premises at the time of the notice had not been occupied for a year; and it is clear, that in order to convert a tenancy at will into one from year to year, an occupation for the second year must at least be entered upon. We have no occasion to say aught in relation to the termination of a tenancy from year to year. Tenancies at will can be terminated by any act or declaration inconsistent with the continued voluntary relation of landlord and tenant,—as notice to quit; threat of legal means to recover possession; anything that amounts to a demand of possession; the bringing of an action to recover possession, which fails, and we think a notice to the tenant, that, if he continues in possession thereafter, he must pay an increased rent, terminates the tenancy. It is in effect saying to the lessee, "You cannot continue in possession of the premises under our present arrangement; you must cease occupying under it." We have no statute provision as to the termination of tenancies at will, and are therefore governed by the common law. When tenancies at will are terminated by notice, the real question is not how long a notice shall be given, or is requisite to terminate it. Notice to quit the possession, or anything equivalent to it, terminates it; and the question necessarily remaining is how long a time has the tenant, to vacate the premises. Under a notice to quit, or, upon the determination of a tenancy at will, in any other manner, a tenant has the right to a reasonable time to vacate the premises, depending upon the circumstances of the case. Under a lease of agricultural lands, he may be entitled to emblements, and can remain long enough after the lease determines, to gather the crops that he has sown, which may be for the greater part of the year. In a lease of buildings, the tenant, when the lease ends, may have nothing in them, and so would need no time to vacate them; in

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a case like the one at bar where the premises are used for storing heavy machinery, the lessee should have reasonable time to procure other accommodations, and remove his property. A case might arise where it would be necessary to erect buildings; store houses might be plenty in the vicinity, or, there might be none. No rule can be laid down to apply to all cases. See *Ellis v. Paige*, 1 Pick. 43, the opinion in which by PUTNAM, J., is given in note to *Coffin v. Lunt*, 2 Pick. 70; *Sheldon v. Davey*, 42 Vt. 637; *Chamberlain v. Donahue*, 45 Vt. 50; *Rich v. Bolton*, 46 Vt. 84. We think the lease was determined by the notice in March, 1886. It was then the duty of the defendants to vacate the premises within a reasonable time; but no question arises upon that subject, as they chose to remain as tenants, and so remaining, the law implies a promise on their part to pay the rent to which the plaintiff notified them they must pay, in case they did remain. The action of the court was correct, and its judgment is affirmed.

VEAZEY, J., did not sit, being absent.

## FOSTER &amp; JAQUITH v. ALMON ADAMS.

*Pleading. Sale. Demand.*

1. When one sells property and agrees to accept in payment a note payable on time with security, and the buyer refuses to give the note and security, the seller can sue at once.
2. And in such case, where the seller requested the buyer to take the property and pay for it as agreed, and he refused to do so, no formal demand for the note and security was necessary.

GENERAL ASSUMPSIT. Heard on a referee's report, December Term, 1887, ROYCE, Ch. J., presiding. Judgment on the report for the plaintiffs. The case appears in the opinion of the court.

*A. E. Cudworth*, for the defendant.

While plaintiffs rely upon this contract, as made, clearly no action can be maintained until something became due under its provisions. *Martin v. Fuller*, 16 Vt. 108; *Scott v. Montague*, Id. 164; *Eddy v. Stafford*, 18 Vt. 235; *Thayer & Co. v. Ballou*, 32 Vt. 234; *Hall & Fish v. Jones*, 48 Vt. 227.

The presumption is that the defendant acted in good faith.

The credit given was a part of the original contract. *De-Symons v. Minchwick*, Esp. N. P. 430; *Fisher v. Brown*, 1 Tyler, 387.

A formal demand for the note, etc., was necessary. *Dutton v. Solmonson*, 3 B. & P. 582; *Pomroy v. Gold*, 2 Met. 500.

*W. W. Stickney*, for the plaintiffs.

The action was not premature. The credit was not absolute but conditional, dependent upon the defendant's giving the note and security. The security was the consideration for the



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credit. *Rice v. Andrews*, 32 Vt. 691; *Hale v. Jones*, 48 Vt. 227; 1 Chit. Con. 615; *Hickling v. Hardey*, 1 Moore, 61.

The rule is different where the debtor is only required to give his own note without additional security. *Mussen v. Price*, 4 East, 147; *Hunneman v. Grafton*, 10 Met. 454; *Martin v. Fuller*, 16 Vt. 108; *Scott v. Montague*, Id. 164; *Eddy v. Stafford*, 18 Vt. 235.

If the purchaser of property, which is conveyed to him promises but neglects to furnish security for the payment at a future day, an action may immediately be commenced and maintained against him for its recovery. *Bank v. McK Ormsby*, 28 Vt. 721.

The opinion of the court was delivered by

TYLER, J: The plaintiffs sold the engine and boiler in question to the defendant on his agreement to give them his promissory note for \$800, payable on time and secured by mortgage on this and other property. After taking the engine to pieces and moving it about one hundred feet preparatory to its removal from Peru to Jamaica, the defendant decided not to take the property and requested the plaintiffs to keep it, which they declined to do. The defendant notified the plaintiffs that he should not take the property and they told him "they wanted he should take the engine and boiler and pay for them as he agreed."

Ordinarily, when one party sells goods to another on a time of credit, he has no right of action for the price, either in general assumpsit or book account, until the time has elapsed. Had the defendant in this case furnished the security he would have been entitled to the full terms of two and three years' credit before an action could have been maintained against him. The question is whether his refusal to perform his part of the agreement as stated in the referee's report, gave the plaintiffs a right to withdraw their credit and bring their action at once.

In the case of *Martin v. Fuller*, 16 Vt. 108, the sale and credit seem to have been absolute, and the time of credit and

the security agreed upon, an after consideration. In *Ascutney Bank v. McK Ormsby*, 28 Vt. 721, it was held that the neglect and refusal of the defendant to furnish the securities when requested prevented him from claiming the benefit of the stipulated credit; that the plaintiff had the right, on such a refusal, to commence his action immediately and recover the balance due. It was held in *Hale & Fish v. Jones*, 48 Vt. 227, that when there was an agreement to give time for payment upon the debtor's giving a note with surety, if such note is not given, the creditor may sue at once in book account or in general assumpsit.

It seems clear, upon the report, that the credit was not absolute, but conditional upon the defendant's giving a note secured by mortgage. As was said by REDFIELD, Ch. J., in *Rice v. Andrews*, 32 Vt. 69: "The security is the consideration for the credit, and when the one fails the other may lawfully be withdrawn." Doubtless, the cases of *Eddy v. Stafford*, 18 Vt. 235, and *Hale & Fish v. Jones*, are reconcilable upon this view.

In *Ascutney Bank v. McK Ormsby* the necessity of a demand for the agreed securities before action brought is recognized. We think, however, in this case, that the defendant's refusal to take the property and the plaintiffs' request that he should take it and pay for it as agreed, obviated the necessity of a formal demand for the note and mortgage before the action was commenced.

As the defendant had taken possession of the property and the title thereto had vested in him, his refusal to give his notes therefor secured by mortgage, as promised, was a waiver of time in making his payments and entitled the plaintiffs immediately to their action in general assumpsit for the price of the goods sold and delivered.

The judgment is affirmed.

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## HANNIBAL ADAMS v. OWEN L. COOTY.

*Mortgage. Statute of Frauds. Assumpsit. Pleading.  
Landlord and Tenant.*

1. There may be an adjustment and recovery on what has been done under a contract which was within the Statute of Frauds. Thus, the plaintiff, on the defendant's request made by letter, purchased a farm for him, but retained the title in himself as security for the price, and the defendant occupied it as owner for several years, paying some of the interest and a part of the taxes, making repairs, and then abandoned the farm; *Held*, (a) that the defendant in effect was a mortgagor in possession, and that his abandonment operated as a foreclosure; (b) and that the plaintiff was entitled to recover the excess of the debt above the value of the premises.
2. The farm was encumbered with mortgages which the plaintiff assumed when he purchased it; *Held*, that as fast as he made a payment on them he had a right to charge it to the defendant as made at his request.
3. A reservation in the deed from the original owner to the plaintiff of waste water does not relieve the defendant, although there was nothing in the letter authorizing the purchase as to it,—as his taking possession of the premises was a ratification.

GENERAL ASSUMPSIT. Heard on a referee's report, December Term, 1887, ROYCE, Ch. J., presiding. Judgment for the plaintiff to recover \$52.40. Exceptions by plaintiff.

The referee reported in part as follows: "In regard to the farm transaction I find the following facts: In the spring of 1877 the defendant was in Elkhart, Indiana, and wrote the plaintiff a letter in regard to the Smith farm; said letter was not produced before the referee. The plaintiff claimed said letter was lost, and was fully examined and cross-examined as to the loss of said letter, and the search he had made to find the same, after which he testified without objections to the contents of said letter, which he said was in substance as follows: 'He wished to have me buy the Smith farm for him—buy it as cheap as I could; it ought to be bought for about two

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thousand dollars. If I would pay for it, and give him time to pay me, he thought he could pay for it.'"

The other facts are sufficiently stated in the opinion of the court.

*William E. Johnson*, for the plaintiff.

The plaintiff merely held the title to the farm as security.

There can be no question but what the defendant could have compelled plaintiff to have deeded him the farm by a bill for specific performance, and we submit that if so the right was reciprocal and plaintiff could have equally compelled defendant to have taken a deed. Browne St. Fr. pp. 444, 448, 462, 471. The Statute of Frauds does not apply. The case rests upon the common principle of a recovery being had for money paid at a party's special request.

*French & Southgate*, for the defendant.

To recover, the plaintiff must show a contract for the purchase of the farm, proved by writing, as required by statute. R. L. s. 981. The letter is not a sufficient memorandum. It must show just what the bargain was. *Ide v. Stanton*, 15 Vt. 685; BENNETT, J., in *Buck v. Pickwell*, 27 Vt. 157 (167); Browne St. Fr. s. 371; *Elmore v. Kingscote*, 5 B. & C. 583, 11 E. C. L. 594; *Peltier v. Collins*, 3 Wend. 459; *Baptist Church v. Bigelow*, 16 Wend. 28.

It does not contain the price, which is the essential of the memorandum of a contract of sale. Browne St. Fr. s. 376; *Ide v. Stanton*, *supra*; *Elmore v. Kingscote*, *supra*.

It shows no more than a "treaty pending," which is not enough. Browne St. Fr. s. 371 *a*.

No subsequent change in the terms can be shown. *Dana v. Hancock*, 30 Vt. 616. If there is no sufficient memorandum there can be no recovery by way of damages or expenses, etc. *Ballard v. Bond*, 32 Vt. 355.

Part performance will not, at law, take a case out of statute. *Hibbard v. Whitney*, 13 Vt. 21; *Davis v. Farr*, 26 Vt. 592;

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*Adams v. Townsend*, 1 Met. 483; *Inhabitants of Freeport v. Bartol*, 3 Me. 340; *Norton v. Preston*, 15 Me. 14.

Rent cannot be recovered, as the relation of landlord and tenant did not exist. *Hough v. Birge*, 11 Vt. 190; *Stacy v. Vt. Cent. R. R. Co.* 32 Vt. 551; Rob. Dig. p. 56.

A party can defend under a contract within the Statute of Frauds. Rob. Dig. 343. Plaintiff has never tendered the defendant a deed. He himself has only an equity of redemption. The water reservation would justify a refusal on the part of the defendant to perform.

The opinion of the court was delivered by

Ross, J. The contention is whether the plaintiff is entitled to recover anything growing out of the purchase of the farm by the plaintiff of the Smiths, and its occupation by the defendant from May, 1877, to March, 1883. The plaintiff does not now claim that he can recover rent for the use of the farm during that period, on the facts found by the referee. The referee has found that there was no agreement express or implied to pay rent—which is necessary to enable the plaintiff to recover rent—but during all that time the defendant occupied the farm as the owner thereof. On these facts a legal claim for rent cannot be predicated. But the plaintiff claims that he is entitled to recover in assumpsit for what he paid out, in the farm transaction during the time the defendant occupied the farm, on the ground, that on the facts found by the referee, such payments were made upon the express or implied request of the defendant. The controlling facts reported by the referee are, that in 1877 the defendant wrote the plaintiff a letter, requesting him to purchase the farm for the defendant and pay for it, and he would pay the plaintiff, but must have time to do so, and stating the sum for which he thought the farm ought to be purchased. The plaintiff made the purchase for the sum named, took a deed to himself, notified the defendant and he immediately moved to, and took possession of the farm, and carried it on, as the owner, until March, 1883. While the

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defendant was so in possession, he paid some interest on mortgage debts assumed by the plaintiff, and made repairs upon the premises. The plaintiff paid the taxes, some of the interest on the mortgage debt, insurance on the buildings, and half of the mortgages which he had assumed to pay in the purchase from the Smiths. The defendant makes a claim that he could not be holden to take the farm, because there was no sufficient memorandum of the trade in writing signed by the defendant. This is doubtless true under the authorities cited. He also contends that the reservation in the deed of the waste water would relieve him because nothing was said about such a reservation in the letter authorizing the purchase. It is a sufficient answer to this contention, that the defendant after he was informed of the purchase made by the plaintiff for him, and at his request, took possession of the premises as owner, and thereby ratified the reservation, if a ratification was necessary. We think the construction to be placed upon the defendant's letter, and the construction which both parties by their acts placed upon it, is, that the plaintiff should buy the farm for the defendant, pay for it, and hold the title as security for payment by defendant, and the defendant would pay him therefor. On this construction and understanding of the parties, the plaintiff was to pay for the farm, and as fast as he paid he had the right to charge it over to the defendant as a payment made at his request and in his behalf. So long as the defendant continued in possession of the farm as the owner, he continued the request to the plaintiff to go on with the payments, and agreed to pay the plaintiff the same, if not in terms, impliedly, from their original and continued relations to the farm. During all this time, the defendant on tendering to the plaintiff payment of what he had paid, and relieving him from the payment of the remaining part of the purchase money, being in possession as owner, could have compelled a conveyance of the farm to himself. So long as these relations between the parties were continued by the defendant by his occupation of the farm as owner, the payments made by the

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plaintiff towards the farm, were made upon the original understanding between the parties, on the behalf, and at the request of the defendant, and upon his agreement both expressed in his letter, and implied from the relations of the parties, to repay the same to the plaintiff. Hence, the plaintiff had the right to charge all such payments to the defendant, and hold the title to the farm as security for their payment by the defendant. When the defendant abandoned the farm, such abandonment was notice to the plaintiff that he would no longer continue the relations.

On these views the plaintiff had a debt against the defendant, when he abandoned the farm for whatever he had paid on the farm transaction, while the defendant continued in its occupation as owner, by way of purchase money, interest, taxes and insurance. This sum is between \$1600 and \$1800, and can be ascertained by the clerk. If the relations of the parties had continued unbroken this would be the sum for which the plaintiff would be entitled to recover from the defendant on this branch of the case. But as we have already said the plaintiff held the title to the farm during all this time as security for the payment by the defendant of the sums so paid by the plaintiff, and also for the repayment of sums which the plaintiff should thereafter be obliged to pay on the farm contract. The defendant abandoned the farm and thereby notified the plaintiff that he would go no further in carrying out the contract. The contract, not having been reduced to writing in all its essential elements and signed by the parties, was within the operation of the Statute of Frauds, and neither party to it could legally maintain any action for its enforcement. They could legally only adjust what had been done under the contract. When the defendant abandoned the farm he thereby surrendered all right in equity to redeem the premises. He could no more maintain an action to redeem than the plaintiff could to foreclose the equity of redemption, or compel him to specifically perform the contract. While in possession, his relation in effect was that of a mortgagor in possession. When ho

abandoned the premises his relation became that of mortgagor with his right of redemption foreclosed. The plaintiff thereafter held the premises absolutely his own; because the defendant, in as much as the contract was within the operation of the Statute of Frauds, could maintain no action to redeem. He held them in payment, so far as available for that purpose of the debt which the defendant owed him arising out of the farm transaction. A mortgagee who has received the mortgaged premises, on a foreclosure, can recover only the excess of the debt secured by the mortgage above the value of the premises when taken on the foreclosure. Hence, the plaintiff has the right to recover only so much of his debt against the defendant, for the payment of which he held the title of the farm, as that debt exceeded the value of the farm above what was then resting upon it. There was one thousand dollars of the purchase price then resting upon the farm. The farm had, while the defendant remained in possession, going forward in carrying out the contract, depreciated in value three hundred dollars. This fixes its cash value when it came back into the possession of the plaintiff, with the defendant's rights therein foreclosed by his abandonment, at seventeen hundred dollars. As there was still one thousand dollars of the purchase money unpaid by the plaintiff, resting upon the farm, there would be only seven hundred dollars available to the defendant to be applied in reduction of the debt which he then owed the plaintiff arising out of the farm contract. To ascertain the exact sum for which the plaintiff is entitled to judgment, it is necessary to have the interest recast on the basis of the views expressed. The case is committed to the clerk to recast the interest and state the sum for which the plaintiff is entitled to judgment.

The judgment is reversed. Judgment rendered for the plaintiff to recover the sum for which he had judgment increased by the sum ascertained by the clerk and his costs.

The judgment against the trustee is affirmed without costs in this court.



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WM. E. DREW (SURVIVING PARTNER OF S. C. FORSAITH & CO.) v. WM. H. EDMUNDS AND NELSON ELLISON.

*Sale. Warranty. Declarations. Off-set.*

1. In the sale of an engine and boiler, the vendor's declarations as to their quality constitute a warranty that they are as described, when the declarations are relied on by the buyer as the basis of the contract, and the vendor so understands it.
2. A defect in a steam chest, readily discernable on taking off the cover, is not a latent defect.
3. The plaintiff sold an engine and boiler with the fittings to the defendants and received the pay therefor; and when the plaintiffs learned that there was difficulty with the governor, they made a proposition to furnish another and take back the old one at a difference of \$45, which offer was accepted without condition; *Held*, in an action to recover the \$45, where the defendants were allowed damages under a plea in off-set for defects in the engine, that plaintiffs were entitled to recover the \$45 on the ground that the acceptance was according to the terms of the offer.
4. A plaintiff who has made two parties defendants is in no situation to deny a counter-claim on the ground that it did not accrue to both and when he had always treated the deal as with both.

ASSUMPSIT. Plea, non-assumpsit, and two pleas in off-set. Heard on a referee's report, December Term, 1887, TYLER, J., presiding. Judgment *pro forma* and without hearing as follows: The exceptions are overruled; the plaintiff has judgment against the defendants for the item of \$84.41 and interest from Feb. 10, 1881 to December 6, 1887, making \$120; and the defendants on their plea in off-set have judgment against the plaintiff for \$212.34 as of the same date;—and judgment entered for the defendant to recover of the plaintiff the balance between said sums, being \$92.34.

The referee found substantially as follows:

“S. C. Forsaith, one of the plaintiffs, deceased after the commencement of this suit. In the fall of 1880, Wm. H.

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Edmunds, one of the defendants, desired to build a steam saw mill and arranged with Nelson Ellison, the other defendant, to furnish him the money with which to purchase a boiler and engine to propel such mill; and the boiler and engine were to be billed to him, Ellison, and to be and remain his property until paid for by said Edmunds.

Edmunds having received a catalogue of boilers and engines kept by the plaintiffs for sale went to their place of business at Manchester, N. H., with the view of purchasing a boiler and engine of them. They had a certain boiler at their shop in Manchester, and an engine at Bridgeport, Conn., both of which were second-hand, and described in the catalogue which Edmunds had received from the plaintiffs. They offered these to Edmunds with the requisite machinery, couplings, pipes, etc., to put them in operation at a certain price and requested him to go to Bridgeport and see the engine, but Edmunds replied that he had no knowledge of such property, and if he bought it, he should rely upon their description of it. He also told the plaintiffs for what purpose he wanted the boiler and engine. He also told them he was not prepared to accept their offer at that time, but that he desired to consult Ellison on the subject and that he would go home and consult him, and let them know in a few days whether their offer would be accepted, and which outfit he would take, two having been offered. The offer referred to is contained in a letter addressed to Nelson Ellison, Bethel, Vt., in which were the following descriptions: 'Pulley has been cracked but strongly mended. The bed is 13 feet by 27 inches, and has been cracked but well patched, and is strong as ever. Engine in good order, and complete with all its parts, including governor; been overhauled and put in good working order; a bargain. Price \$425. We offer you our boiler No. 4233, repaired, tested, \* \* \* complete, ready to set up,' etc.

"The offer contained in the letter was accepted, and the engine and machinery were shipped December 4, 1880, to Ellison at Bethel, Vt., and were taken by said Edmunds and set up and put in operation. It was found that the injector was too small for the boiler, and that the governor was not suitable for an engine running a saw-mill. On learning this from the defendants, the plaintiffs took out the old injector and put in a new one, and charged on their specification in this action \$103.30, and gave credit for the old one \$33.70.

"But, as I find that the first injector furnished was too

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small to supply this boiler with water, and the plaintiff's contract required them to furnish a suitable injector, I have disallowed all these items of debt and credit.

"There was also trouble with the governor to the engine as before stated, and said foreman of the plaintiffs had his attention called to it, when at the mill changing injector, and then told Edmunds that it was not suitable for his business. After their foreman returned, the plaintiffs on the 22d day of February, 1881, addressed a letter to the defendant Ellison, and among other things making this offer: 'As to the regulator (governor) itself, it would work well enough on an engine running steadily as this did before, not running so uneven as you do, in feeding on to a log full size of your saw, then out of your log with nothing on, and we fear will trouble you. Our foreman took the proper measures, so if you desired, we could get out and fit here a new governor and send you, with valves and fittings, all new, best the country affords, at a difference of \$45 between these new and your old governor and parts.' Ellison made no reply to this offer, but sent the letter to Edmunds, who on the 28th day of February, telegraphed said firm from Bethel as follows: 'Send governor and fittings to-morrow express without fail, reply to-night,' thereby accepting the offer.

"Inasmuch as Edmunds told the plaintiffs he wanted this engine to run a saw mill and they sold it for that purpose, I think they were bound to furnish the engine with a suitable governor for that purpose, and so find subject to the opinion of the court. If the court should hold otherwise, or should also find that the claim of the defendants that the plaintiffs were under obligations to furnish them a suitable governor with the engine for operating a saw mill, was waived or settled by the acceptance of their offer by Edmunds as aforesaid, I then allow the item of \$45.00 for the governor and disallow the item of \$1.20 for work on the same,—interest is also to be allowed on said item of \$45.00 from April 1, 1881; otherwise I disallow both said items.

"Soon after the new governor had been put on to the engine, it was discovered that the steam chest of the engine was out of repair and leaked so badly as to very much lessen the power of the engine. Edmunds tried to get along with it, by wedging it up and repacking it, but could only saw in his mill about 2500 feet a day, with the same help that after the engine had been repaired he sawed, as the evidence shows, 10,000 feet per

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day. On taking off the cover to the steam chest, it was discovered that the latter had been badly eaten by steam, and had been fixed up with red lead or putty. Edmunds managed to saw out his logs that winter and spring but the next November he took his engine or portions of it to the shop of David Short-sleeves at Rutland for repairs. On examining the steam chest it was found to be so badly eaten that it could not be repaired so as to do much service, and a new steam chest was made for the engine. This defect in the steam chest was not visible until cover was removed. From the evidence I find that the engine was not in good order and complete in all its parts, etc., nor had it been put in good working order when shipped from plaintiff's place of business, according to the printed description of the same aforesaid. I also find that it would have cost to put it in such order or repair as required by the said printed description of the same, one hundred and fifty dollars, in addition to the governor furnished by the plaintiffs as aforesaid, and with which sum the plaintiffs are chargeable under their contract or warranty. I also find that the said Edmunds ordered of the plaintiffs certain other machinery, belting, work, etc., it being items No. 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 as numbered and grouped in the plaintiffs' specifications, amounting in all to \$84.41, at the agreed price to be charged therefor.

"I further find that the descriptions of said boiler and engine and the representations as to their condition and state of repair contained in said printed slips upon said exhibit 18 constituted the basis of the purchase of said property made by the defendants and were relied upon by them as the Plaintiff Drew well knew. I therefore find that such descriptions and representations constitute a warranty of said boiler and engine,—that they were both in the condition and state of repair indicated thereby. I further find that no other representations than as above stated were made in regard to said engine and boiler. After the sale of the same to the defendants as aforesaid, said engine was brought to the plaintiff's shop at Manchester aforesaid and examined by said Drew and the plaintiff's foreman and so far as they could see it was all right; but they did not open the steam chest, and without opening it, its condition could not be seen."

It was found subject to the opinion of the court, that if the defendants were liable to pay for the governor, \$45.00, the

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plaintiffs were entitled to recover \$180.93, including interest to December 6, 1887, and certain other items amounting to \$84.41, and interest on these; and that if the defendants were entitled to recover on their pleas in offset, the said \$150.00 should be on interest from January 1, 1881, to December 6, 1887, and it would amount to \$212.34.

*French & Southgate*, for the plaintiff.

It is clear that Ellison is liable with Edmunds. The charge for the new governor is correct. There was a proposition and it was accepted. The defendants had had the engine about three months, had full knowledge of its capacity, and did not claim that the plaintiffs were any way responsible by their contract of sale for the failure of the governor. But in any view they are entitled to this item.

The plaintiffs made no representations as to the fitness of the engine for sawing logs, and there was no evidence that they had any prior knowledge about it. They purchased it second-hand as it was; they only represented that it was in "working order." It was in working order and plaintiffs were guilty of no fraud.

In sales by description the only implied warranty is "that the property shall answer the description." 2 Benj. Sales, s. 966 (p. 844); Story Sales, s. 358; 34 N. Y. 118; *Sweet v. Colgate*, 20 Johns. 196; *Mixer v. Coburn*, 11 Met. 559.

The defendants' claim in offset has no foundation. The trouble with the steam chest was a latent defect, unknown to the plaintiffs. They purchased the engine in Connecticut, as second-hand, and it remained there until sold to defendant, and was then brought to Manchester and examined by the plaintiffs and their foreman, and considered all right.

Numerous cases of this character have been before our court, involving the sale of a potash kettle, *Stevens v. Smith*, 21 Vt. 90; *Combination Lock, Tilton Safe Co. v. Tisdale*, 48 Vt. 83; worthless cow, having latent defects, *Bryant v. Pember*, 45 Vt. 487; wrought iron shafting with latent defects, *Bragg v. Morrill*, 49 Vt. 45.

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There is not an implied warranty against latent defects unknown to the vendor. 2 Benj. Sales, ss. 968, 985. The rule of *caveat emptor* applies where the seller is not the maker or grower. *Hoe v. Sanborn*, 21 N. Y. 552-566; *Kimball v. Vroman*, 35 Mich. 310; *Parks v. Morris Ax and Tool Co.* 54 N. Y. 586; *Cogel v. Kingsley*, 89 Ill. 598; Benj. Sales, p. 814, note 8; *McGraw v. Fletcher*, 35 Mich. 104; *Whitmore v. South Boston Iron Co.* 2 Allen, 52-58; *Gossler v. Eagle Sugar Refinery*, 103 Mass. 331; *Welsh v. Carter*, 1 Wend. 185.

Not giving notice is an admission that the plaintiffs were not liable to them, or a waiver of any claim. 1 Par. Con. 475.

When the facts are found the question whether they amount to a warranty or implied warranty is a question of law. In written sales it is always a question of law, unless the language is equivocal or the intent doubtful. 2 Benj. Sales, p. 813, note 7; *Story Sales*, 358 (441-4); *Edwards v. Marcy*, 2 Allen, 486, 489; *Brown v. Bigelow*, 10 Ib. 242; *Whitney v. Thacher*, 117 Mass. 523.

If Ellison should be discharged the offset would fall, as the sale was made to him. A set-off can only be between the parties to the suit. Revised Laws, 916; *Bragg v. Fletcher*, 20 Vt. 351; *Adams v. Bliss*, 16 Vt. 39; *Phelps v. Buckley*, 20 Vt. 17.

*J. J. Wilson*, for the defendants.

The injector, governor and steam chest were not such as the contract required. The plaintiffs afterwards furnished a new injector and governor, and a bill of goods ordered by the defendants, amounting to \$84.41.

The defendants resist the charges except the \$84.41, and seek to recover damages. The referee disallowed the charge for injector; and, as it appears from the report, the plaintiffs have not done anything more than make their contract good as to the governor. They were bound to do what they did do; and the defendants have never waived their damages. The

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referee also disallowed the bill for the governor; he might have allowed it, and allowed the defendants full damages for breach of warranty, and arrived at the same result.

The referee found that the descriptions and representations constituted a warranty. The defendants are entitled to recover the difference between the damages allowed at \$150.00 and interest, and \$84.41 and interest, amounting to \$92.34.

As to its being a sale for a particular purpose, see *Beals v. Olmstead*, 24 Vt. 114.

The opinion of the court was delivered by

VEAZEY, J. When the plaintiffs got word that there was difficulty with the governor they made a proposition to furnish another with all the fittings, etc., and take back the old one, at a difference of \$45. The defendants accepted the offer without objection or condition. Whatever might have been the right of the defendants independent of this arrangement, we hold that having gone into it they must stand by it. The plaintiffs had the right to understand, by the acceptance of their offer without notice of other claim, that the acceptance was according to the terms of the offer.

The plaintiffs are therefore entitled to recover the item of \$45, with interest thereon since April 1, 1881.

The plaintiffs insist that the defendants cannot maintain their claim in offset for several reasons. First, that there was no warranty in the sale of the engine and boiler. The referee finds there was a warranty, and bases that finding on the statement in the printed slip (taken in connection with other findings), that the engine had been overhauled and put in good working order and was in good order and complete in all its parts. It is further found that this description and representation constituted the basis of the purchase by the defendants and were relied upon by them as the plaintiffs well knew, and that they knew nothing about such property as to its value or quality, and had then had no experience in using it, and it did not appear that either of the defendants examined the engine and boiler before the purchase.

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The findings are explicit that the defendant Edmunds, who made the purchase, told the plaintiffs that he had no knowledge of such property, and if he bought this engine and boiler he should rely upon the plaintiffs' description of them; and that he also told the plaintiffs for what purpose he wanted them, which was the sawing of logs into lumber in a saw-mill. The plaintiffs were dealers in engines and boilers in Manchester, N. H.

In *Hogins v. Plympton*, 11 Pick. 99, SHAW, Ch. J., said: "There is no doubt that, in a contract of sale, words of description are held to constitute a warranty, that the articles sold are of the species and quality so described." Again in *Winsor v. Lombard*, 18 Pick. 60, the same learned judge said: "It is now held that, without express warranty or actual fraud, every person who sells goods of certain denomination or description, undertakes, as part of his contract, that the thing delivered corresponds to the description, and is in fact an article of the species, kind and quality thus expressed in the contract of sale."

This doctrine has been reasserted in many cases in Massachusetts and elsewhere. In this state in *Beals v. Olmstead*, 24 Vt. 114, it was held that when the vendor's statements form the sole basis of the sale, his declarations are ordinarily to be regarded as a warranty.

The referee finds that the engine was not in good order and complete in all its parts, nor had it been put in good working order, according to the printed description. There was therefore the positive affirmation that the article had certain qualities which the referee finds it did not have, and this affirmation was relied upon as the basis of the sale and was so understood by the vendors. In *Pasley v. Freeman*, 3 T. R. 57, BULLER, J., referring to the early cases of *Cross v. Gardner*, Carthew 90; 3 Mod. 261, and *Medina v. Stoughton*, 1 Lord Raymond, 593; Salk. 220, said: "It was rightly held by HOLT, Ch. J., and has been uniformly adopted ever since, that an affirmation at the time of a sale is a warranty,



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provided it appear in evidence to have been so intended." In determining whether it was so intended, Benjamin, in his work on Sales, s. 613, says: "A decisive test is whether the vendor assumes to assert a *fact* of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to have an opinion, and to exercise his judgment. In the former case there is a warranty, in the latter, not."

In view of all the facts in the report we think it impossible to predicate error in the conclusion of the referee that there was a warranty.

It is further claimed that the breach found by the referee is in respect to a latent defect. An express warranty covers a latent defect. But we do not think the defect in the steam chest as found by the referee was a latent defect. It was readily discoverable, on taking off the cover, that the chest had been badly eaten by steam, and had been fixed up with red lead or putty. It would seem that such a defect could not escape observation in overhauling an engine, as the plaintiffs said they had done. The defendants could not discover the defect, because not visible until the cover was removed, and they would have no occasion to take it off if in good order. They had the right to rely on the representation.

It is further claimed that the offset did not accrue to both defendants, and so must fall.

We see no good ground for severing the deal. It ran through several months and the plaintiffs always treated it as a deal with both defendants, and made their writ and specifications against both. They are in no situation to deny a counter-claim in the law suit in behalf of both.

Judgment reversed; and judgment for the defendants for \$28.44, without costs.

MYRA A. BLODGETT'S ESTATE v. JULIUS  
CONVERSE'S ESTATE.

ADELINE EDSON'S ESTATE v. SAME.

MELISSA A. CONVERSE'S ESTATE v. SAME.

*Interest. Agent. Executors and Administrator.*

1. When a financial agent or attorney mixes the money of his principal with his own by depositing it in his general bank account, and draws it out and uses it in his own business, it is presumed that he has gained a benefit, and on failure to show how much he has derived from the use, he is chargeable for interest.
2. In such case, a request to settle, with an expressed willingness by the agent, but a neglect to do so, because neither party was quite ready to attend to it, is not equivalent to a demand for payment.
3. When an agent has interest-bearing securities in his possession belonging to his principal, the law presumes that he received the interest thereon; the burden is on him to prove that he had not received it; and without an explanation sufficient to relieve him from payment he is chargeable with the interest.
4. A married woman died testate, and in a short time her executrix deceased. No steps were taken for some time to have the will proved, and the husband of the testatrix had her estate in his hands. It was not found that the delay was caused by his fault; *Held*, that he could not be treated as an executor *de son tort*; and that he should only be held to exercise the care of a faithful agent.

APPEAL from the Probate Court.

The appellant filed the general counts in assumpsit.

Heard on the report of a referee, December Term, 1887, TYLER, J., presiding. Judgment *pro forma* in the Blodgett case to recover the sum of \$455.83; in the Edson case, the sum of \$6,406.45; and in the Converse case the sum of \$629.89. Exceptions by the plaintiffs. The facts are sufficiently stated in the opinions of the court.

*N. L. Boyden and Davis & Enright*, for the plaintiffs.

The only question is as to the time when the reckoning of

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interest should commence. The commencement of interest does not hinge on the time or fact of a demand. *Hall v. Peck*, 10 Vt. 474; *Mansfield v. Wilkinson*, 26 Iowa, 482; *Lewis v. Bradford*, 8 Ala. 652; Story, Agency, ss. 179, 205. It was the duty of Mr. Converse to keep the money on hand uninvested if he wished to be relieved from payment of interest. *McNeal v. Hodges*, 83 N. C. 504. In New York it has been held that an executor employing funds in business is chargeable with compound interest. *Berwick v. Halsey*, 4 Redf. (N. Y.) 18. And the same has been held in New Hampshire. *Griswold v. Chandler*, 5 N. H. 492; *Halsey v. Farmers' & Mechanics' Bank*, 26 Vt. 104; 1 Am. Lead. Cases, 522; *Hinckley v. Gilman, Clinton & Springfield R. R. Co.* 100 U. S. 591; 1 Perry, Trusts, p. 570; 2 Wend. 77; *Perkins v. Hollister*, 59 Vt. 348.

"As the administrator mingled the trust money with his own, he is chargeable with the highest legal rate of interest, and can be allowed nothing for his services in caring for the same." *McCloskey v. Gleason*, 56 Vt. 264; *Spalding v. Wakefield*, 53 Vt. 660; *Farwell v. Steen*, 46 Vt. 678; Am. Law Reg. (Jan. 1887) p. 27; 2 Esp. 702.

Mr. Converse was executor *de son tort* as to Mrs. Converse's estate. *Shaw v. Hallihan*, 46 Vt. 389; *Maxwell v. Briggs*, 17 Vt. 176; 2 Sedgw. Dam. 186-9. See *Hauxhurst v. Hovey*, 36 Vt. 544.

*William E. Johnson* and *J. J. Wilson*, for the defendant.

The matter pertaining to Arnold's estate cannot be settled except in a suit brought by his representatives. R. L. s. 2071. On the facts found in the Blodgett case Mr. Converse was not liable to pay interest unless he actually received interest, unless a demand was made for the principal, or until he was in default in not paying when he ought to have paid. The relation of debtor and creditor could not have existed until demand was made. *Hall v. Peck*, 10 Vt. 478; Chit. Con. 238; 1 Chit. Pl. 330; *Miller v. Clark*, 5 Lansing, 388;

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*Williams v. Stoors*, 5 Johns. 353; *Chesworth v. Edwards*, 8 Ves. 46. An executor has no authority to loan money which a legatee is entitled immediately upon demand. *Jacot v. Emmett*, 11 Paige, 142.

It seems that there is a distinction between an action for not accounting, and an action for not paying over, the proceeds of goods sold, and that in the former case it is enough to show neglect to account within a reasonable time to maintain the action. *Cooley and Bangs v. Betts*, 24 Wend. 203.

Interest is only allowable when there is a contract to pay it, either express or implied, or when the party is legally in default. *Hauxhurst v. Hovey*, 26 Vt. 544; *Pawlet v. Sandgate*, 19 Vt. 621.

When there is no express contract to pay interest no implied contract arises, and it is not recoverable, except when the parties fail to claim payments after it was their duty so to do. *Brainerds v. Champlain Trans. Co.* 29 Vt. 154; *Sprague v. Sprague*, 30 Vt. 483; *Evans v. Beckwith*, 37 Vt. 285.

An agent receiving money for his principal, or an attorney for his client, is not liable for interest thereon, unless he has received special instructions to remit as fast as collected, or is in default in neglecting to render an account. *Hauxhurst v. Hovey*, *supra*; *Jacot v. Emmett*, *supra*; *Miller v. Clark*, *supra*; *Williams v. Stoors*, *supra*; *Chedworth v. Edwards*, *supra*.

The opinion of the court was delivered by

Ross, J. These cases were referred to the same referee, and stand for consideration on his reports which are dependent more or less upon his report in the principal case. The only contention upon all the reports is when and under what circumstances will the defendant estate be liable for interest. The persons whose estates are plaintiffs in interest, were sisters, and the last named was the former wife of the late ex-Governor Converse. He seems to have been the financial

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agent of the three, for a good many years. He settled the estate of their father. He also settled the estate of Mr. Edson. Although some questions arose before the referee in regard to his relations to these two estates none is pressed before this court. Mr. Converse acted for the three sisters in the settlement of their brother Gardner Arnold's estate. The three received in all over twenty thousand dollars from this estate. Mr. Converse was the agent and attorney of the three, and as such received all the money from the executor of Gardner Arnold's will. He deposited the money thus received in his own name in connection with his own deposits in two banks. Most of it was received in 1868 and 1869, but some in 1872. He credited the three with the money as received, and as he paid out to, or invested it for, each, charged the general account with the payments and investments, and charged each sister with the payments or investments made for her. His bank accounts, which are referred to by the referee, show that within less than a year after he made deposits of money and funds received from Gardner Arnold's estate, he had drawn it all out and used it in some way. The investments for the earlier part of the time were for his wife and Mrs. Edson. He made some payments to Mrs. Blodgett, but no investments for her, but turned over some to her in 1875. She had a large balance in his hands all these years, on which the referee has allowed her estate no interest. After he had once withdrawn it from the bank, his accounts do not show that he replaced the amount so drawn out. The accounts show that he did not keep the money belonging to Mrs. Blodgett on deposit for her. Her estate claims interest on the amount he had in his hands, deposited in his general bank account in his own name, or at least interest on it after the accounts show that he withdrew and used the money. Mrs. Converse died in December, 1872. She made a will, and Mrs. Edson was the executrix named in it. She died in January, 1873, and the will was not proved until 1875. Mr. Converse had her estate in his hands all this time and did not pay it over entirely during his life. He

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deceased in 1885. He also had Mrs. Edson's property in his hands when she died and did not fully settle with those entitled to her estate during his life. He was called upon to settle with all these estates in 1875, and frequently after, and expressed a willingness to settle, but it was never accomplished. In his account with his wife's estate, he made several charges to it of investments, and afterwards—but when was not shown—wrote against such charges "taken back." He had interest-bearing debts belonging to both the estate of his wife, and of Mrs. Edson. The referee has allowed interest on these, only so far as shown by his account that he received it, or his receipt was otherwise proved. The referee allowed no interest on the investments charged, and afterwards entered "taken back." In 1881 suits were brought against Mr. Converse in favor of these estates, and in favor of Mrs. Blodgett, who subsequently deceased. These suits were abated by the death of Gov. Converse. The referee has charged his estate with interest in favor of the three estates only when his books showed he received interest or it was otherwise shown, until the suits were brought, and has allowed interest on the balance found due each estate at the time the suits were commenced. It is claimed for the estates, in addition to what has already been stated for Mrs. Blodgett's estate, that the call for a settlement in 1875, was equivalent to a demand for payment, and that all three estates should be allowed interest on whatever was in his hands at that date, or at least that he should account for interest on all that was then in his hands from that date, or show some valid reason why he should not pay it. It is further contended that when interest-bearing debts and securities are once shown to belong to an estate or to have been charged to an estate by him, he could not take them back to his own use, without securing to the estate the interest it would have received from the investment—at least without showing good reason for taking the investment back—and that where interest-bearing investments are once shown into his hands, it is to be presumed he received the interest thereon; that it was his duty to show

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why he did not receive the interest as it became due from time to time, if he did not, and that without such showing his estate should be charged with all the interest that was legally due on such investments. While these claims do not all apply to all the cases, all arise in the cases. We are not so much troubled to ascertain the rules of law applicable, in general, to these several claims made in behalf of the plaintiff estates, as we are to apply them justly and fairly to the facts of these cases. Gov. Converse was evidently the trusted, confidential financial agent of these three women. Their relations were very intimate and friendly. His charges after he had received the money from Gardner Arnold's estate, for its care were small. It almost looks as though they intended he should make some profit from the use of their money unaccounted for. But this is not found by the referee, nor any facts from which an inference can be legally drawn. Not a settlement with any of them is shown by his books, unless it was with his wife. The immediate parties are all deceased. No one is left to tell us how they regarded these financial dealings, or what understandings they had in relation to them. Under such circumstances we know of no guide, except the well-established rules of the law. These must be applied to the facts as they have left them.

I. In regard to the money received from Gardner Arnold's estate for Mrs. Blodgett, which was deposited in his general bank account and drawn out and used, we think the law is well settled, that Mr. Converse was chargeable for interest from the time he used it. He received this money as her agent or attorney. In *Miller v. Clark*, 5 Lansing, N. Y. R. 390, it is said: "If an agent mixes the money of his principal with his own, and makes use of it, he is liable to pay interest on it from that time, or if he uses it separately, and makes a profit upon it, or puts it to interest while in his hands, the principal is entitled to such profit or interest."

"But as a general proposition, an agent is not liable to be charged with interest upon moneys received, and held by him

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for the use of the principal. In order to render him liable for interest some other fact must be shown in addition to the mere receiving and retaining the money in his hands." Dunlap's Paley on Agency, 49, 50; *Williams v. Storrs*, 6 Johns. Ch. 353.

In *Lewis v. Bradford*, 8 Ala. N. S. 632, it is said: "Where one has the money of another in his hands and uses it, he cannot avoid the payment of interest, by answering that he does not know what profit was made by its use. In such a case he is, at least, liable for interest while it was so employed." We think this a clear and just statement of the law upon the subject.

To the same effect is *Hinckley, Recr. v. Gilman, C. & S. R. R. Co.* 100 U. S. 153, Bk. 25 L. Ed. 591; Wharton's Agency and Agents, s. 243. Mr. Wharton says: "An agent who mixes his principal's property with his own is liable for interest; and the burden of proof will be on him to distinguish the two masses. If he fail to do this, the aggregate may be charged to him as the principal's." He cites a large number of cases in support of this doctrine. The last sentence of the quotation implies that the agent derives a benefit from the use of the property. We should not be prepared to say that the agent or attorney who deposits his principal's or client's money to his own credit, in his general bank account, would thereby make himself liable for interest. But we think, when he has so mixed his principal's money with his own, and has used it by making drafts upon it for his own use, the law presumes he gains a benefit from such use; that he is thereupon called upon to show what benefit he has derived from such use, and on his failing to show the benefit derived, will be charged with interest upon it. *Hauxhurst v. Hovey*, 26 Vt. 544, is not opposed to these views. That case holds that an agent or attorney who collects and retains the money of his principal will not be chargeable with interest unless he has orders to remit as fast as collected, or the money has been demanded, or some other fact is shown to place him in legal default. The referee's re-



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port does not show the amount of interest Mr. Blodgett's estate would be entitled to on this holding. The case will be sent to the clerk to have this computation made, and for other purposes hereafter indicated.

II. We do not think a request to settle with an expressed willingness on the part of Mr. Converse, but a neglect to do so, because neither party was quite ready to take up the matter, equivalent to a demand to pay over what was in Mr. Converse's hands. From all that is found, the reason the settlement was not made might have been quite as much the fault of the plaintiffs as of the defendant. The facts reported do not bring the case within the cases relied upon for the plaintiffs. In *Hall & Chase v. Peck & Co.* 10 Vt. 474, a demand for payment after the suit was dated, but before it was served, was held sufficient to authorize the commencement of the suit, and if the commencement of the suit, the commencement of interest, as damages. But in this case, with what accompanied it, the request for settlement cannot be held equivalent to a demand for payment. In *Gleason v. Briggs*, 28 Vt. 135, an attempt at settlement, in which each party denied the claims of the other, was held, a little doubtfully, to be a demand for payment by both parties. Says Judge REDFIELD, "they met and attempted to settle, which was fairly enough, perhaps, regarded as a demand or claim of payment upon both sides for what should happen to be due." This was said in upholding the action of the auditors in casting interest for both parties, as of that date. But as is said in *Hauxhurst v. Hovey*, *supra*, to authorize the allowance of interest against an agent or attorney, there should be something shown to make it appear "that the party is legally in default." This does not appear from the facts reported, when all are considered. This contention for the plaintiffs is not sustained.

III. We think, from the principles already stated, it follows that where an agent or attorney has interest-bearing securities in his hands belonging to his principal the law presumes

that he receives the interest thereon and the principal, and that the burden is cast upon the agent to show that he has not received the interest as it became due, nor the principal. By shoving such investments into the agent's hands, he is made accountable therefor. He cannot escape liability by silence, nor by saying, "I don't know what I received thereon." Nor does the failure of his account to show the receipt of interest remove his accountability therefor. The entries there made are made by himself, and his failure to make any entry does not account for what has been shown into his hands, nor for interest, which he should, and the law presumes he does, receive on interest-bearing securities. In short, an agent receiving money is to account for it as money without interest, unless he is shown to be legally in default in regard to its payment, and receiving interest-bearing securities, is to account for the principal and interest without further showing; and his failure to account for either is not an accounting; nor when he has once charged himself with interest-bearing securities, is the writing against such charge at some indefinite time in the future, "taken back," such an accounting. The moment the principal's funds were invested in such securities, they became the property of the principal, and the principal was entitled to the avails of such investments, principal and interest. The agent or attorney could not divert such investments to his own use, without liability for interest on the investments so diverted. By taking such investments, once vested in the principal, to his own use, without something further shown, the agent converts them to his own use, and should be charged with interest on their value, at least, until he replaces them with other interest-bearing securities. We do not mean to say the agent could not be allowed to explain such action in a manner that would relieve him from the payment or allowance of interest, but that without explanation, he is chargeable with interest.

IV. The plaintiff contends that Mr. Converse is to be treated as an executor *de son tort* of his wife's estate, and that

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this would render him liable as for the conversion of the estate. But if under our system of settling estates this common law doctrine is applicable, of which there may be a doubt, *Shaw, administrator, v. Hallihan*, 46 Vt. 389,—we do not think it applies to Mr. Converse in this case. His wife died testate. The executrix died within less than a month thereafter. No steps were taken for some time to have the will proved. He is not found to have been in fault for the delay. In the meantime he had the estate in his hands. It needed caring for. We think that he should be held to exercise the care of a faithful agent or attorney for whomsoever should thereafter be appointed administrator with the will annexed. This contention of the plaintiff is not sustained. The referee has not stated, with sufficient particularity, the facts and dates, to enable this court to ascertain the exact sums for which judgments should be rendered in each of these cases. But the holdings on points one and three reverses the judgment of the County Court in the three cases and the matter is referred to the clerk to make on notice, the necessary computations of interest upon the facts found by the referee, in accordance with the views herein expressed, and judgment is rendered for each plaintiff for the sum so ascertained with costs, and the costs of the suit abated by the death of Mr. Converse;—the judgments to be certified to the Probate Court.

*In re* CHAUNCEY WORCESTER'S ESTATE. M. F.  
MORRISON, ADMINISTRATOR; ADELINE  
WORCESTER, APPELLANT.

*Executors and Administrators. Homestead. Widow.  
Practice.*

1. The administrator was licensed to sell the real estate at public or private sale, and sold it at public action to the highest bidder; but before making the deed he was informed that he could sell it for more than the auction price, and although no memorandum had been made, believing that the sale was binding upon him, he consummated it. Neither bad faith nor neglect of duty was found; *Held*, that he was chargeable with only what he received for the land.
2. When a homestead is a part of premises encumbered by a mortgage executed by a husband and his wife, it is under the burden of bearing its proportion of the mortgage debt.
3. A widow by consenting that the administrator of her deceased husband's estate might sell under order of court premises in which she has a homestead interest, does not waive her rights to the homestead fund.
4. But the court declined to decide whether the administrator could use the homestead fund to pay the expenses of this appeal, which was taken by the widow from the order of the Probate Court allowing his account, as that question is not before the court.

APPEAL from a decree of the Probate Court for the District of Windsor. Heard by the court, May Term, 1887, ROYCE, Ch. J., presiding. Judgment affirming the decree of the Probate Court.

The Probate Court allowed the administrator's account and ordered the balance of the estate to be paid to the appellant.

It appeared from the report of the commissioner that the mortgage on the premises amounted to \$1,093.27; that the debts allowed by the commissioners on the estate amounted to

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\$397.26, not including the mortgage; that it did not appear that there was an order of court directing the administrator to pay out any part of the estate, but that the widow, the appellant, directed him to pay the debts allowed by the commissioners; that he paid two claims before they were allowed and before she gave the said direction, but which were afterwards allowed; that the administrator received for the premises \$386.73, after deducting the mortgage from \$1,480, the amount for which both pieces of land sold for. It also appeared from the administrator's account that the estate was credited with \$1,087.98, for personal property, including the said \$386.73; and that it was charged with \$957.18, leaving in the hands of the administrator \$130.80.

The charges were as follows :

1. To funeral charges, etc., Schedule B,	\$ 36 50
2. " paid taxes and insurance, Schedule C,	36 62
3. " paid list of claims,	397 26
4. " paid interest to G.W. Ayres,	2 20
5. " comm'r and apprs. probate fees and printing, Schedule D,	41 43
6. " miscellaneous bills, Schedule E,	117 92
7. " paid widow, Schedule F,	135 08
8. " personal property used by widow,	99 64
9. " adm'r's services, Schedule G,	38 98
10. " paid att'y bills,	45 05
11. " paid probate fees in settlement,	6 50
	<hr/>
	\$957 18
12. " paid expenses in this suit,	
13. " time spent in this suit,	

No. 6, Schedule E, was made up of a number of small charges : as paid for weighing hay, \$2; for counsel fee, \$2; for recording, etc., \$53, etc.; \$64.33 paid out by request of the widow; and \$25.50 paid for cutting and drawing wood, etc. Chauncey Worcester gave by will his entire estate to his wife, the appellant, but she waived the provisions of the will. It was found that the farm was sold below its actual value, and below the appraisal. The other facts are sufficiently stated in the opinion.

*Davis & Enright*, for Mrs. Worcester.

The homestead included both pieces of real estate. *Hastie v. Kelly*, 57 Vt. 293. After paying the mortgage, the balance of what the premises sold for belonged to the widow as a homestead fund. She did not waive her rights to a homestead by assenting to the sale of the real estate under the application of the administrator. *Day v. Adams*, 42 Vt. 516. When the widow waived the will the homestead money in the hands of the administrator was "simply a trust for the legal owners not as a fund subject to the orders of the Probate Court." *VEAZEY, J., in Probate Court v. Winch*, 57 Vt. 284.

And the Probate Court had no jurisdiction over it further than to order it passed over to the widow. If the Probate Court went further than that its decree was void and may be treated as a nullity. *Id.* 284.

In the following cases the decrees of the Probate Court were held to be void, because made in a manner not authorized by law: *Smith v. Rice*, 2 Mass. 507; *Proctor v. Newhall*, 17 Mass. 91; *Hendricks v. Cleveland*, 2 Vt. 337. The homestead, like the one-third of the personal estate of a person dying intestate, vested in Mrs. Worcester immediately upon the decease of her husband. *Probate Court v. Winch*, 57 Vt. 284, 285; *Thayer v. Thayer*, 14 Vt. 107; *Holmes v. Bridgeman*, 37 Vt. 28; *Norton v. Hall*, 41 Vt. 467. In *Mann v. Mann's Estate*, 53 Vt. 54, Ross, J., says: "By force of the statute, the homestead vested in the plaintiff on the decease of the intestate." See *Doane v. Doane*, 33 Vt. 653; R. L. s. 1898. None of the debts charged by the administrator were ever legally charged on this homestead in the lifetime of Mr. Worcester, nor upon the real estate in any manner. Neither in *Lamb v. Mason*, 50 Vt. 345, nor in *Devereaux & Meserve v. Fairbanks*, 52 Vt. 587, was there any question as to the homestead right of the widow, but a question of an apportionment of the burden of the mortgage between the homestead and the levy. That case was decided by a divided court, and has no application to this one.

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The statute, R. L. s. 1906, provides: "If said homestead or land included therein is mortgaged by the joint deed of husband and wife, the joining of the wife in such mortgage shall have no other effect than to bar her claims to such homestead as against such mortgage." *Goodenough v. Fellows*, 53 Vt. 108. This mortgage has been paid out of the proceeds of the sale, and there is no pretence that such payment was by direction of the widow. The homestead is not subject to administration. Thompson on Homesteads, sec. 546. It forms no part of the estate to be administered in the Probate Court. *Carter v. Randolph*, 47 Tex. 379; *Estate of Tompkins*, 12 Cal. 114; *Estate of James*, 23 Cal. 415; 25 Tex. 72; 21 Tex. 665. The administrator was guilty of negligence in the sale of the premises, and he should be charged with the loss. He should have accepted the offer of \$1,600. No order was made by the court for the payment of debts, and the administrator paid at his own risk. R. L. s. 2066. He paid one claim of \$10 before the widow gave any direction. There is nothing in the case in which the court can find an estoppel as to the payment of items 5, 6, 9, 10. *Turner v. Coffin*, 12 Allen, 401; 9 Allen, 455; 2 Scribner, Dower, p. 484; 1 Lead. Cas. Eq. 302, 320; *White v. Langdon*, 30 Vt. 599; *Strong v. Ellsworth*, 26 Vt. 366.

*W. E. Johnson*, for the administrator.

1. By the finding of the commissioner and the decision of the Probate Court, there are in the hands of the administrator \$130.80. The administrator should be charged with only what the premises sold for, and not for the \$270 dollars in addition. No question as to this item is before the court. All matters of discretion are not revisable in this court; and whether he should be so charged is largely in the discretion of the lower court. It cannot be said there was legal error. The administrator acted in good faith; sold the property at public auction after due notice; tried to get relieved, and the purchaser refused; and sold because he supposed he was in duty

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bound so to do. To hold the administrator, it must be found that he acted in bad faith.

2. The widow takes by section 1898, R. L., such a homestead as the husband died seised. In this case the real estate was sold for \$1,480, and the mortgage amounted to \$1,093.27. This mortgage rested evenly upon the whole premises, and as heavily on that part which would have been set out for a homestead as upon the remaining portion. Therefore, the homestead right was what was remaining after paying its proportion of the mortgage debt. The homestead must therefore pay the mortgage in the proportion that \$500 bears to \$1,480. By this computation the homestead must pay towards the mortgage the sum of \$369.34. Deduct this amount from the \$500, and it leaves the value of the homestead, which vested in the widow, \$130.66. The court will therefore perceive that the homestead of the widow remains untouched and unexpended.

The law in reference to the homesteads, where they are mortgaged, has been definitely settled in this State in two cases, *Lamb v. Mason*, 50 Vt. 345; *Devereaux v. Fairbanks*, 50 Vt. 700. Whatever view be taken as the amount and value of the homestead in this case, we insist all the items in the administrator's account should be allowed out of the funds in his hands, and only the balance, as shown by his account as allowed by the commissioner, should be decreed to the appellant.

The opinion of the court was delivered by

TAFT, J. In the course of administration it became necessary to sell the real estate of the deceased. License to sell it at public auction or private sale was duly granted. It was sold at public auction to the highest bidder. After the sale and before the making of the deed, the administrator was informed that he could sell the property for two hundred and seventy dollars more than the price it sold for at auction. No memorandum in writing was made of the auction sale, and therefore



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it is claimed that the sale was, under sec. 981, R. L., not binding on the administrator. The administrator believed the contract of sale binding upon him, and consummated it. We are asked to say upon the facts reported, that he should be charged with the price which, it is contended, he might have received. The vendee at the auction sale was ready to complete the purchase, and insisted upon so doing.

The evidence tended to show that the administrator had doubts as to whether the offer of the increased price would be adhered to, and whether the sale made at auction, if he attempted and failed to make another, might not be lost. No neglect of duty nor bad faith on the part of the administrator is found by the referee. It is not found that he could have completed the sale at the increased offer. We fail to see, on the facts reported, any legal reason for charging the administrator with the amount claimed, although the farm sold for less than its real value. The amount for which an administrator should be charged in case of the sale of property belonging to an estate, is not the value of the property, but what he receives for it, acting in good faith, in the exercise of ordinary care and prudence, and free from all neglect. We cannot hold as matter of law that an administrator should plead the Statute of Frauds in order to avoid a contract which he, in good faith, has made, and believes to be morally and legally binding upon him. Upon the facts reported, the commissioner did not err in declining to charge the administrator with the two hundred and seventy dollars. The appellant concedes that all the other items credited the estate are correct, unless found otherwise upon trial, and the referee reports that it was not so found. As to the items charged the estate, no question is made which would effect the judgment below, save the objection raised by the appellant, that some of the items were paid by funds which were realized from the sale of the homestead, and in fact belonged to her, and to which, as against the estate, she was entitled.

At the intestate's death his real estate consisted of his home

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farm of about one hundred and ten acres and a pasture lying near to but not adjoining it, of fifty acres. The whole was encumbered by a mortgage signed by the intestate and appellant, amounting to \$1,093.27. The home farm sold for \$1,330, and the pasture for \$150. The premises were sold by order of the Probate Court, the appellant consenting to the sale. Such consent did not bar the widow of such right in and to the homestead as she took upon the decease of her husband. The homestead was under the burden of bearing its proportion of the mortgage debt. *Lamb v. Mason*, 50 Vt. 345; *Devereax v. Fairbanks*, *ibid.* 700. It is not clear from the report that the homestead extended to and covered the pasture lot; but conceding that it did, there are still funds enough in the hands of the administrator to pay the widow the amount of her homestead interest, one hundred and thirty dollars and sixty-five cents. What the amount of her homestead interest is, and whether the appellant can claim it as against the unsettled items of the administrator's account (items Nos. 12 and 13), are questions not properly before us. All that we decide is that, so far as the account is now before us, no error appears in the judgment below, and the same is affirmed, and the cause ordered certified to the Probate Court.

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## FRANKLIN COUNTY, JANUARY TERM, 1888.

Present : ROYCE, Ch. J., TAFT, ROWELL and TYLER, JJ.

JOHN PALMER AND WIFE v. THE VILLAGE OF  
ST. ALBANS.*Municipal Corporation. Village. Master and Servant. Negligence. Evidence. New Trial. Referee.*

1. To charge one man with the negligence of another, it is not enough to show that the latter was in the employment of the former; but it must be shown that, in doing the act complained of, he was engaged in his master's business, acting within the scope of his employment, and that there existed between them the relation of master and servant, which is the foundation of the rule *respondeat superior*.
2. Thus, an incorporated village is not liable for injuries resulting from the negligence of one of its employees in piling tiles at the direction of the defendant's street commissioner in a yard occupied by it in storing its property, when the defendant village was not the owner of the tiles, and they were not in its custody or control, and the commissioner, taking advantage of his official position, was acting, as to the tiles, not as its servant, but as an individual for his private gain; and when the act did not amount to a nuisance, and a public trust was not involved.
3. The owner or occupant of real estate is not liable for injuries resulting from the negligent use of personal property on it, when he neither owns nor controls the personal property, unless the use amounts to a nuisance.
4. In an action against a village for injuries resulting from the negligence of its employee in piling tiles, parol evidence was admissible to prove that the defendant neither owned nor controlled them, although they had been shipped to the defendant, and a bill of them had been rendered to it, and allowed by the president of its board of trustees.
5. A cause will not be remanded for the referee to revise his findings as to a certain point, on the ground that it was not regarded as very important by counsel, nor given much prominence on trial, when it appears from the papers and briefs that the point was brought to the attention of the referee by both sides, and discussed in the court below, as it would amount to granting a new trial.

CASE for negligence. Heard on a referee's report, exceptions, and motion to recommit, September Term, 1887, POWERS, J., presiding. Judgment on the report for the damages found. Reversed.

The referee found, in substance :

That the defendant was a municipal corporation, duly organized under the laws of Vermont, and that its fiscal year began the first Wednesday in April in each year; that in 1879, at a meeting of the trustees of the village, Marshall Mason was by them appointed water superintendent and street commissioner, and again appointed April 10, 1880, and that he acted in that capacity during those years, and was paid for his services by the village; that at the time of the injury complained of the village was in the occupancy of certain land called a corporation yard, paying rent therefor at the rate of \$38 per year; that the front or main part of plaintiffs' house came to, and stood along the south side of, the corporation yard; that a close-boarded fence ran from the north-east corner of the main part of plaintiffs' house, along the south line of the corporation yard, to the east line of the plaintiffs' premises; that between said fence and a part of plaintiffs' house there was a space 31 feet and 6 inches long (east and west) by nine feet wide (north and south); that part of this space was used as a clothes-yard for hanging out clothes to dry; that the plaintiffs were man and wife, and the wife took in washing, and the clothes-yard was in constant or daily use by her; that the plaintiffs claimed that on April 14, 1880, the fence, by reason of pressure from tiles or drain-pipe negligently piled or allowed to be or fall against it in the corporation yard, fell into the clothes-yard, and inflicted severe bodily injury upon the plaintiff wife; and their evidence tended to show, and the referee found that said tiles were then in the apparent custody of the village by its servants and employees; that a prudent man, knowing the apparent condition of the fence, and the use made of the clothes-yard, and considering the condition in which the ground would naturally be in the spring of the year, would

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not, in the exercise of prudence, have so piled the tiles, and left them so piled, until the 14th of the next April; and so finds that the tiles were negligently piled and left; that the plaintiff wife went into the clothes-yard to get some clothes hanging there, when part of the fence gave way and fell against and upon her, and that two pieces of six-inch tile, weighing from 50 to 55 pounds each, followed the fence and rested upon it as it lay upon the ground, and one bend of smaller tile, weighing about 10 pounds went over the fallen fence to the south side of it; that the fence fell by reason of pressure or force received from the tiles, and caused by the negligent manner in which the tiles had been piled and left as above stated.

The defendant offered evidence tending to show that the tiles were the property of Ripley Sons, and were in the custody and control of said Mason as an individual, and not in his official capacity. The plaintiffs objected to the evidence so offered, claiming that it was not competent to show such facts. The referee admitted the evidence subject to the objection and exception of the plaintiff, and from it finds, in regard to the ownership and custody of the tiles, that Mason had been water superintendent and street commissioner of said village for some time prior to 1876; that in the year 1876 he had made an arrangement, orally with Ripley Sons, manufacturers of cement tile or drain pipe, which was thereafter acted upon until after said April 14, 1880, by which he was to order from them from time to time tiles to be kept in stock at St. Albans; they were to send him memoranda of shipments made on such orders, and he was to take charge and care of the tile; from the tiles shipped and received the village was to have, and he was to sell to other parties, tiles as they were wanted. At the end of the season, when the ground got to be in such condition that tiles could not be laid, he was to take and send them an inventory of tiles remaining unused and unsold; the quantity so inventoried was to be deducted from the quantity shipped, and the balance paid for; and he was to receive from them a percentage of the amount received by them for tiles so disposed and paid for.

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Under that arrangement tiles were ordered, shipped, and received from time to time, and were generally taken to and stored in the corporation yard, though they were sometimes stored in other places where village property was stored; were sometimes stored in places not occupied by the village, and were sometimes delivered and taken directly from the cars for immediate use. A great deal of the tile was used in making sewers in the village of St. Albans, the sewers being ordered and located by the trustees and then constructed under the direction of Mason, in his official capacity, by employees of the village, and the expense being apportioned and assessed to the abutters, and collected of them into the village treasury.

Mason also sold tile from the same storage to other parties in the vicinity. The bills of assessments to abutters, and for tiles sold others, were made out by Mason and delivered to the treasurer of the village for collection, and were collected and paid into the village treasury. The freight on the tiles shipped to St. Albans was paid by the village, and the tiles were handled by men employed and paid by the village, and at the end of the season a bill or statement was rendered to the village, and the village paid for the tile which had been used by the village, and in making sewers, and that which had been sold and paid for into the village treasury. In such bills or statements to the village, the tile remaining unsold and unused at the end of the season were credited to the village, and the tile so credited were carried into the stock of the next year, and treated in the same manner as tiles received upon further orders and shipments.

At the end of each village year, Mason, as water superintendent, made a report, and also as street commissioner made another report, to the trustees, which reports purported to show what property of the village he, in those capacities, had in his charge. And the tiles which had been inventoried and credited to the village that year at the end of the season for laying tiles, were not included in either report.

The trustees knew that the tiles used by the village were

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from Ripley Sons, and at what price they were being had. The trustees coming into office in the spring of 1880 did not know until late in that year that tiles were sold to individuals and the pay collected into the village treasury, or that tiles were being kept in stock as above stated, or what the terms of arrangement with Ripley Sons were, or that Mason acted in any way for or received a compensation from Ripley Sons.

The tiles in said corporation yard on April 14, 1880, had been sorted and piled there the autumn before by employees of the village, at Mason's direction; he had made and sent to Ripley Sons an inventory of them; a statement or bill had been rendered by Ripley Sons to the village, in which those tiles had been credited to the village, and none of those had been used by the village.

The referee found that, if evidence tending to show the above-stated facts relating to the tiles and custody of the tiles was properly admitted against the plaintiffs' objection and exception, the tiles in the corporation yard on said April 14, 1880, were not, when piled, and thence until after April 14, 1880, the property of the village, and were not in the custody and control of the village or its servants or employees, as such, during that time.

The referee found that the plaintiff's wife, when she received the injury, was acting as a prudent person who did not know the condition of the tiles, and did not have any reason to apprehend any danger on account of them, might, in the exercise of prudence, have acted at that time and place; that if on this report the plaintiffs are entitled to recover, they are entitled as damages for the bodily injury to the plaintiff's wife the sum of \$1,500, and the costs of the suit.

Exhibits V, W, X and Y were simply bills of drain pipe, which purported to have been presented by Ripley Sons to the village of St. Albans at the end of each of the years 1877, 1878, 1879 and 1880, and were marked "allowed" by the president of the village.

*Wilson & Hall* and *Cross & Start*, for the defendant.

The evidence of Mason tended, at least, to support the facts found by the referee; and hence the referee's findings are conclusive. *Stevens v. Pearson*, 5 Vt. 503.

A referee's report must be accepted or rejected upon the same grounds that govern the validity of awards. *Kimball v. Baxter*, 27 Vt. 628. It must appear that the referee has violated known and acknowledged principles of justice, or his report must stand. *Martin v. Wells*, 43 Vt. 428; *Fuller v. Adams*, 44 Vt. 543; *Darby v. St. Albans Nat. Bank*, 57 Vt. 370.

The question of the custody of tiles was a material one to be found by the referee. *Vilas Nat. Bank v. Strait*, 2 New Eng. Rep. 112, 58 Vt. 448.

Mason was not authorized to act for the defendant as to the tiles; and it never ratified his acts. *Boom v. Utica*, 2 Barb. 111; *Hodges v. Buffalo*, 2 Denio, 113.

The doctrine of *respondeat superior* cannot be invoked against defendant. Dill. Mun. Corp. s. 772; *Walcott v. Swampscott*, 1 Allen, 101; *Morrison v. Lawrence*, 98 Mass. 221; *Sayer v. Boston*, 19 Pick. 511.

It must at least appear that the act complained of constituted a nuisance, or there could be no liability. *Bailey v. Troy & B. R. Co.* 57 Vt. 253.

The owner or possessor of real estate is not answerable for acts of negligence committed upon it, if the conduct of the business which causes the injury is not on his account, or under his control. *Earle v. Hall*, 2 Met. 353; *White v. Montgomery*, 58 Ga. 204; Shearm. & Redf. Neg. s. 495; *Way v. Powers*, 57 Vt. 135; *Bailey v. Troy & B. R. Co. supra.*

But if Mason, in his official capacity, or the trustees even, had made first such an arrangement with Ripley Sons as the referee finds was made, then it is submitted that the village was not liable; for such an arrangement was not within the scope of their authority, expressed in the charter. Dill. Mun. Corp. s. 381; 4 Wait Act. & Def. 644. A corporation is



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bound only when its officers act within the charter or scope of their powers. Dill. Mun. Corp. s. 766; *Smith v. Rathbun*, 57 N. Y. 122; *Anthony v. Adams*, 1 Met. 284; *Perley v. Georgetown*, 7 Gray, 464; *Harvey v. Rochester*, 35 Barb. 177.

Acts *ultra vires*, though done *colore officii*, impose no corporate liability. Ang. & A. Corp. s. 311; Dill. Mun. Corp. s. 770, note.

Under the charter, the trustees are a board of public officers to build sewers—when the public health shall require it. In the exercise of this power they are the agents of defendant, but they represent the general public; and the defendant cannot be made liable for any neglect of the trustees while exercising their powers. *Welsh v. Rutland*, 56 Vt. 228; *Cushing v. Bedford*, 125 Mass. 526; *Young v. Yarmouth*, 9 Gray, 386; *Seele v. Deering*, 4 New Eng. Rep. 550; *Lemon v. Newton*, 134 Mass. 476; *Burrill v. Augusta*, 1 New Eng. Rep. 697; *Boyd Insurance Patrol*, 5 Cent. Rep. 233; *Hafford v. New Bedford*, 16 Gray, 297; *Fisher v. Boston*, 104 Mass. 87; *Jewett v. New Haven*, 38 Conn. 268; *White v. Marshfield*, 48 Vt. 20; *Eastman v. Meredith*, 36 N. H. 284.

*M. Buck & Son*, for the plaintiffs.

The referee found that the tiles, at the time of the injury, were in the apparent custody of the village by its servants and employees.

The question of title is immaterial; it was so held in this case. 56 Vt. 519.

The evidence to prove that Ripley Sons were the owners of the tiles was not admissible; but if evidence of ownership was admissible then exhibits V, W, X, and Y are the best evidence, and the plaintiffs' objection to Mason's testimony as to the tiles were well taken.

These bills show that the transactions as to the tiles were between the Ripleys and defendant; that both parties treated them as sales; that the tiles were shipped and charged to de-

fendant; and that the bills were received and approved by defendant. *Davis v. Bradley*, 24 Vt. 55.

On all the facts found by the referee, the defendant is estopped to deny its custody of the tiles. The defendant's conduct indicated it to be the actual, and therefore the responsible custodian of the tiles; and relying upon this, the plaintiffs brought their suit; and it would operate a fraud upon them, to allow the defendant to deny that it acted in the capacity in which it appeared to act.

*H. C. Adams*, also for the plaintiffs.

The rule laid down in *Joel v. Morrison*, 6 C. & P. 501, and in *Croft v. Alison*, 4 Barn. & Ald. 590, governs this case. The injuries received were caused by the negligent acts of the defendant's servants, acting in the course of their employment. No question can be made about the corporate powers of the village, or the authority of the trustees to construct sewers. Tiles were necessary. Power to do a particular thing implies the power to employ the necessary means to that end. The sewers were ordered and located by the trustees, and then constructed under the direction of Mason, in his official capacity, by the employees of the village. Express authority in Mason to procure tiles was not necessary. 2 Dill. Mun. Corp. s. 766.

The freight on the tiles was paid by defendant, and from the time the tiles arrived in St. Albans, they were handled by employees of the village and paid for by it. There was nothing in the nature of the acts of custody that can be imputed to Mason's agency for Ripley Sons. There was a ratification by the trustees.

The opinion of the court was delivered by

ROWELL, J. The defendant offered evidence tending to show that before and at the time in question the tiles were the property of Ripley Sons, and in the custody and control of Mason as an individual, and not as water superintendent nor street commissioner, both of which offices he had for a long

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time and then held. The plaintiffs objected to the admission of this evidence, for that it was not competent to show such facts. But the referee admitted it, and found therefrom certain facts, which he details, and from those facts alone he finds that the tiles in the corporation yard on the day of the accident were not when piled there the fall before, nor thence until after the accident, the property of the village, nor in its custody or control, nor in the custody or control of its servants or employees as such.

It was competent to show what it is said the evidence tended to prove, unless it is to be said that the village is liable any way, because the tiles were on its land and in its apparent custody and control. But such is not the rule in respect of real estate, as we shall see, unless the act complained of is a nuisance in itself, or, perhaps, a public trust is involved, neither of which elements is present here.

It is not claimed that the evidence did not tend to show the facts found from it, but that the finding *from* those facts is unwarranted. And here the question is, Do those facts tend to support the finding? If they do, the finding must stand. It is true, as argued, that many of them tend strongly against the finding, and to show that the custody and responsible control of the tiles were in the village in fact as well as in appearance, and for its own purposes and business; but it is also true that some of them tend to show the contrary, and to support the finding, and so it must stand, and the case be decided from that standpoint; for we do not think, as argued by Mr. Buck, that the exhibits referred to preclude parol evidence of ownership, nor that the defendant is estopped to deny its custody of the tiles.

It is contended that the rule laid down in *Joel v. Morrison*, 6 C. & P. 501, governs this case. There the defendant's servant, in going from one place to another with his master's team on his master's business, drove *extra viam* for some purpose of his own, and while thus driving negligently ran against and injured the plaintiff; and it was held that if the

servant was going out of his way against his master's implied command when driving on his master's business, he made his master liable; but if he was going on a frolic of his own, without being at all on his master's business, that the master was not liable. The law is here most properly laid down, as said in *Sleath v. Wilson*, 9 C. & P. 607, where it is said to be quite clear, that if a servant, without his master's knowledge, takes his carriage out of the coach house, and with it commits an injury, the master is not liable, and on the ground that he has not intrusted the servant with the carriage; but that, when the master has intrusted the servant with the carriage, it is no answer to say that the servant acted improperly in its management, for if so, it might be claimed that if the master directs his servant to drive slowly but he disobeys and drives fast and thereby negligently causes an injury, the master is not liable, which is not the law, for in such case the master is liable, because, by entrusting the servant with the carriage he has put it in his power to mismanage it.

*Quinn v. Power*, 87 N. Y. 535, is much to the same point. There the defendant owned a ferry boat running across the Hudson between two points. One day when the boat was making a regular trip, the pilot in charge took on a boatman as matter of favor, and agreed to put him on board his boat, which was part of a tow passing up the river. The ferry boat diverged from its course to reach the tow, and through the negligence of those in charge collided with a canal boat attached to the tow, whereby the plaintiff's intestate was thrown into the river and drowned; and the defendant was held liable. In discussing the case the court says: "When this ferry boat left the dock at Athens it started for its terminus at Hudson. It took freight and passengers to transfer across the river. Servants and boat, as the latter moved out into the river, were doing the master's business and acting both in the line of duty and employment. There was a usual track or route by which the boat crossed. It may even have been selected and directed by the owner. In deviating from it the

servants might disregard the instructions of the master, but they were none the less engaged in the master's business of transporting freight and passengers from one point to the other because they did not follow the usual route or pursued another or even a forbidden track. They were still doing their master's business, though in a manner contrary to his instructions. If they stopped the boat in the middle of the river, they did not cease to be engaged in the master's business. Even if the motive was some purpose of their own, they were still about their usual employment, although pursuing it in a way to subserve their own purpose also. When they took this passenger to the tow, and in so doing deviated from the usual course, and stopped the boat midriver for that reason, they were still engaged in the master's business of transporting freight and passengers across the river. They were doing it in a way not authorized, perhaps, and possibly in some sense to effect a purpose of their own; but they were none the less acting within the scope of their employment and engaged in their master's business." This reasoning brings out clearly both the rule and its application.

The rule of *respondeat superior* is of universal application, whether the act be one of omission or of commission, whether negligent or fraudulent. And it makes no difference that the master did not know of the act, or disapproved it, or even forbade it, provided the servant was acting at the time for the master and within the scope of the business entrusted to him. *Philadelphia & Reading R. R. Co. v. Derby*, 14 How. 468; *Rounds v. The Delaware, Lackawanna & Western R. R. Co.* 64 N. Y. 129; *Quinn v. Power*, 87 N. Y. 535.

But the foundation of the rule is, the relation of master and servant. When that does not exist, the law does not impute to one man the negligence of another. *Hexamer v. Webb*, 101 N. Y. 377; *Quarman v. Burnett*, 6 M. & W. 499. Hence, the modern cases all show that it is not enough in order to charge one man with the negligence of another, to show that the latter was acting at the time under the employment of the

former; but you must go further and show that the employment created the relation of master and servant between them. *Hilliard v. Richardson*, 3 Gray, 340, where the cases are collated and commented upon.

Now, testing this case by the rule invoked for its government, we regard the finding that the tiles were not the property of the village, nor in its custody or control, as perfectly fatal to the plaintiffs' right of recovery, as it absolutely negatives the existence of the relation of master and servant between the village and Mason or any other of its employees in respect of the tiles, and precludes the considerations urged upon us to show the contrary. Although Mason and the others who handled and piled the tiles were at the time the employees of the village, yet they were not its servants as to them, for it was not the business of the village, nor a matter in which it had any property nor over which he had any control; but it was a frolic of Mason's own, in which he seems to have taken advantage of his official position for the purpose of private gain.

Nor do we see any other ground on which the plaintiffs can stand.

It has sometimes been said that there is a distinction in this respect between fixed and movable property, and that one in the possession of the former must take care that it is not so used as to injure others, and this, whether it be used by his own immediate servants or by contractors or their servants; that injuries done upon such property are in the nature of nuisances, for which the occupant ought to be held chargeable when occasioned by those whom he brings upon it; that the law confines its use to him, and he should take care not to bring persons upon it who do mischief to others. This distinction is adverted to in *Laugher v. Painter*, 5 B. & C. 547; *The Mayor etc. of New York v. Bailey*, 2 Denio, 433; and noticed in *Quarman v. Burnett*, 6 M. & W. 499. But on full consideration in *Hobbit v. The London & Northwestern R. R. Co.* 4 Exch. 254, it was held that there is no such distinction

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except when the act complained of is such as to amount to a nuisance. And this is undoubtedly the present view. But possibly we should add to the exception, cases involving a public trust, as intimated in *Hilliard v. Richardson*, 3 Gray, 349, 364.

The result is that the judgment below is reversed, and judgment on the report for the defendant.

The petition for a new trial, preferred by the defendant, has no foundation, and is dismissed with costs.

And now before entry of judgment the plaintiffs move that the judgment below be reversed *pro forma* and the cause remanded, to the end that the report may be recommitted to the referee for him to revise his finding in respect of the ownership, custody and control of the tiles, because, it is said, that point was not regarded by plaintiffs' counsel as very material, and was not given much prominence before the referee; and counsel think that the finding of the referee is so manifestly wrong that on further hearing and full argument, even without more testimony, it is very certain he would change it.

When this case was here on exceptions to the directing of a verdict for the defendant—56 Vt. 519—a prominent question was, whether there was evidence tending to show that the village had the custody and control of the tiles; and it was held that there was, and that if it had, their ownership was immaterial. It also appears from papers now handed up that the point was brought to the attention of the referee by both sides, as well in requests for findings as in the briefs of counsel. It also appears from briefs used before the County Court that the matter was discussed there.

In these circumstances we know of no practice that will warrant the granting of this motion. It amounts to asking for a new trial for the purpose of experimenting with the referee for a different result.

E. G. AND S. C. GREENE v. LANSING MILLS'  
ESTATE.

*Book Account. Original Entries as Evidence.*

In an action against a deceased person's estate, the plaintiffs' accounts on book, with proof of the handwriting and when made, are evidence under the statute (R. L. s. 1004), tending to show a sale and delivery of the goods in dispute; and the auditor's decision as to how much weight should be given to them, and whether they are sufficient to entitle the plaintiff to recover, is conclusive.

BOOK ACCOUNT. Heard on an auditor's report and exceptions thereto, September Term, 1887, POWERS, J., presiding. Judgment for the plaintiffs.

The second exception to the report was as follows: "Because the auditor in allowing plaintiffs' account, considered that the plaintiffs' account book, with the testimony of E. G. Greene as to the handwriting and when made, were alone legally sufficient, if uncontradicted, to sustain the plaintiff's claim."

As to the testimony of E. G. Greene, the exceptions stated: "And the plaintiff, E. G. Greene, testified that the entries were in the handwriting of one Ballard, who was a clerk for the plaintiffs in their store at the time the entries were made; and, against the objection of the defendant, he also testified that the entries on the day-book were made at the time they bear date."

The other facts appear in the opinion.

*Noble & Smith* and *H. Charles Royce*, for the defendant.

The account books of the plaintiffs, with the testimony of



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the handwriting, did not constitute in law a *prima facie* case; they were not alone "legally sufficient, if uncontradicted, to sustain the plaintiffs' claim." *Hunter v. Kittridge's Est.* 41 Vt. 359. The auditor comes in direct conflict with the above case; for though he finds that the account "is correct and ought to be allowed," he reaches that finding by applying the rule, which, as a rule of law, was there expressly condemned. The expression "legally sufficient, if uncontradicted," means precisely the same as "*prima facie* evidence." *Kelly v. Jackson*, 6 Pet. 722.

It is plain from an examination of the report that, independently of the application of this rule, the auditor has not found that the plaintiffs are in fact entitled to recover. Except the general finding he does not find any facts in their favor.

He says that the day-book in which the items of their account was originally entered "appeared to have been regularly and fairly kept," and that the "items of said account appeared to have been regularly entered, etc." This is not finding that the book *was* regularly kept, etc. As this court said in *Hunter v. Kittridge's Estate*, "The book upon its face may appear regular and correct, and yet every charge on it be false." It is an auditor's business, as much as it is a jury's, to find how things *are*, not how they *seem*.

If the fact that charges made with apparent regularity in a merchant's book are evidence that credit was given, delivery made to the deceased, and all other facts that might be material to the establishment of a claim, then indeed an estate would become an easy prey to dishonest men. *Dwinell v. Potter*, 31 Me. 324.

*Farrington & Post*, for the plaintiffs.

There was no error in the findings of the auditor. But the fact charges stand upon the book, and the book is proved, does not necessarily bind the auditor to treat the book as *prima facie* evidence that the charges upon it are true. In order to justify the auditor in allowing any disputed charge, he should

find as *matter of fact* that the charge is correct, and the defendant is still indebted for the same; and the auditor would not be justified in allowing any disputed charge upon proof of the book unless he is also satisfied from *such proof*, or other proof, that the defendant had the property, or services so charged to him. The auditor should be convinced by a fair balance of the evidence; and in this case the books and the testimony of E. G. Greene, were alone legally sufficient; the auditor was fully satisfied what the fact was, and had previously found it.

But we are not left here by the auditor; he has found the fact from this testimony, and some slightly corroborative circumstances.

If there was any proper evidence tending to prove the facts found, no exception can prevail,

The opinion of the court was delivered by

TYLER, J. Section 1004 of the Revised Laws provides that: "In actions of book account and when the matter in issue and on trial is proper matter of book account, the party living may be a witness in his own favor so far as to prove in whose handwriting his charges are and when made." \* \* \*

In the case of *Hunter v. Kittridge's Estate*, 41 Vt. 359, which is relied upon by counsel on both sides of this case, the auditor erroneously decided, as matter of law, that the production of the books of account of the deceased, with proof of the handwriting of the charges therein, and when made, was *prima facie* evidence of the correctness of the charges and of a subsisting indebtedness.

In this case the auditor reports that the plaintiffs presented their account, that upon this testimony he found the account was correct and ought to be allowed, and that he accordingly allowed it. He then states what the evidence was, upon which he allowed it; namely, the plaintiffs' day-book, upon which the items contained in said account were originally written, which book appeared to have been regularly kept and the items

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of the account to have been regularly entered thereon to the debit of the deceased at the time of their respective dates, with proof that the handwriting was that of a clerk of the plaintiffs, and that the charges were made at the time of their respective dates; also, that the plaintiffs put in evidence two ledgers containing the amount in question transferred thereto from said day-book. He adds that there was no other evidence in the case in support of the plaintiffs' claim except some slightly corroborative circumstances. It is clear from the whole report that the auditor found as a fact from the evidence that the goods were sold and delivered by the plaintiffs to the deceased, in his lifetime, as charged in said book. It is true that by request of the defendant the auditor states "that in his consideration of the case he was of the opinion that said account-books, with the testimony of E. G. Greene, above recited, were alone legally sufficient, if uncontradicted, to sustain the plaintiffs' claim"; but in view of what he had before stated in his report, he evidently meant by this statement that he felt legally warranted, upon this evidence alone, in finding for the plaintiffs to recover the amount of their account.

In this class of actions, accounts on books, accompanied with proof of the handwriting and when made, are always regarded as evidence, are in fact made evidence by statute, and are entitled to some weight as testimony to show a sale and delivery of the goods sought to be recovered for. How much weight they should receive, whether or not they are sufficient to make a *prima facie* case for the plaintiff, must rest wholly in the judgment of the triers of the fact. Certainly no rule of law could be laid down by which their weight could be determined. The case of *Bacon v. Vaughn*, 34 Vt. 73, and *Hunter v. Kittridge's Estate*, above cited, are both full authorities on this point.

The auditor properly received this evidence, and his decision as to its sufficiency to entitle the plaintiffs to recover is conclusive. The judgment of the County Court is therefore affirmed.

## JOHN H. BARNEY v. W. W. ROCKWELL.

*Attachment. Service of Writ.*

1. It is not a legal attachment of property in the possession of a bailee, where the officer first commences his service by attaching other property, and then merely writes to the bailee that he has attached that in his possession, and requests him to keep it, and the bailee agrees to keep it. The officer did not acquire sufficient possession of the property.
2. It is not necessary that an officer in making an attachment should have the writ with him; it is sufficient if he has it in his custody and control when he takes the property into his possession, without having the writ upon his person; and it is error for the court to refuse, on request, to so instruct the jury.

TRESPASS and trover. Trial by jury, April Term, 1887, Ross, J., presiding. Verdict for the defendant. The return on the writ stated that the officer attached the property February 9, 1885, and that on February 28, 1885, he delivered a copy to the defendant. It appeared that the plaintiff in this suit sent his note by the defendant in the original suit, notifying Reynolds of the attachment of the machine in his possession.

The court charged the jury in part as follows :

“ And from the evidence in this case Mr. Barney went there on the 11th, and went to the machine, and made an arrangement with the owner of the premises to take charge of the machine for himself; if he then had this writ in his custody and control, we charge you that would be a good attachment of it; and although Reynolds did not keep right by the machine all the time (he was not there on the 12th when Rockwell came and took it), it was not necessary to keep possession in Mr. Barney; for, for that purpose, it was on Barney's premises; Reynolds agreed to be his agent and custodian; the premises were premises that he had a right to control, and no

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one had a right to go and take anything off of them without his leave; so that it would be a valid attachment of the machine, if Barney at that time was clothed with authority to make the attachment; and that is the real question on this part of the case. \* \* \*

“ This is the first question for you to determine, whether Mr. Barney, on the 11th, was there with the writ, acting under its authority in doing what he did, in attaching this machine on that day. If he has satisfied you of that fact, then under the law relating to the other facts that are not in controversy, or giving the facts their widest scope, we hold the plaintiff would be entitled to recover.

“ If you find he did not have the writ and was not acting on it, then your verdict will be for the defendant.”

The other facts are sufficiently stated in the opinion of the court.

*H. H. Burt and Farrington & Post*, for the plaintiff.

When Reynolds promised Patnod, the defendant in the original suit, to keep the property for Barney, he became Barney's agent; and his possession was the possession of the officer. REDFIELD, Ch. J., in *Lyon v. Rood*, 12 Vt. 233; Lord MANSFIELD, in *Blatch v. Archer*, Cowp. 63, said: “ That the officer must be the *authority* to arrest is certain; but he need not be the hand that arrests, nor in the presenee of the person arrested, nor actually in sight, nor in any prescribed distance.”

But if it is held that what was done on the 9th of February did not amount to a legal attachment, when the officer on the 11th took manual possession of the property and put it into the keeping of Reynolds, as his bailee, it cured any possible defect in the first attempt to attach. *Newton v. Adams*, 4 Vt. 437; 21 Vt. 215. *Coffrin v. Smith*, 51 Vt. 140, is directly in point. There was error in the court's refusal to charge as the plaintiff requested.

That the jury were thus misled is apparent from the fact that the return shows that service of the writ was not made on the defendant, by delivery of a copy, till the 28th of February.

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*F. W. McGettrick*, for the defendant.

The sending of the letter to Reynolds was in no sense an attachment. *Fitch v. Rogers*, 7 Vt. 403 ; *Blake v. Hatch*, 25 Vt. 555.

The circumstances developed by the testimony did not call for any such explanation, or charge to the jury, as the plaintiff requested the court to give.

The issue of fact was, whether or not the plaintiff on the 9th of February made his return and returned the writ to the party from whom he received it. If this issue was decided in the affirmative, it must be manifest to any one that the officer had surrendered his custody and control of the writ, and could do no more under it. Hence, there was no occasion for the explanation requested.

The opinion of the court was delivered by

ROYCE, Ch. J. This was an action of trespass and trover, brought to recover for a horse-power and separator, which the plaintiff claimed to have attached on a writ which was put into his hand for service as constable of the town of Swanton. The writ was made returnable to the April Term, 1885, of the Franklin County Court, and was delivered to the plaintiff for service on the 9th of February, 1885 ; and the only question made was, whether the plaintiff made such an attachment of the property as gave him such a lien upon it as would enable him to recover as against the claim of the defendant, who as constable of the town of Alburgh levied an execution upon the same property. The plaintiff commenced the service of the writ on the day he received it, and it then being impossible to go to Alburgh, where the horse-power and separator were, he attempted to make an attachment of them by sending a letter signed by him as constable to Mr. Reynolds, in whose possession the property then was, notifying him that he had attached the threshing machine and separator and requesting him to keep it in his care until he heard from him. Said Reynolds received the letter and promised to keep the property for said

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Barney ; and the first question presented is, whether what was thus done by Barney constituted a valid attachment.

It is said in *Drake on Attachments*, s. 256, that an officer attaching personalty must actually reduce it to possession, so far as under the circumstances can be done ; that what is an actual possession, sufficient to constitute an attachment, must depend upon the nature of the property ; that it should be such a custody as would enable the officer to retain and assert his power and control over it. There was nothing in the nature of this property that could prevent the officer from taking actual possession of it, so as to bring it within any known exception to that rule. In *Dodge v. Way*, 18 Vt. 457, the plaintiff went with a tax warrant to the place where grain was deposited belonging to the defendant, and informed the party in possession that he had distrained it, and requested him to keep it for him, which he refused to do, but agreed to, and did, inform the defendant of the distress, and the defendant continued to use and dispose of the grain without regard to the distress. The plaintiff brought an action of trespass for its value, and it was held that the plaintiff by the distraint had not acquired such a lien as would enable him to maintain the action. It has been held in the cases cited in *Roberts' Digest*, on page 61, that to constitute an attachment of personal property the officer must have the custody or control of it by himself or his servants. The plaintiff did not even see the property when he attempted to attach it on the 9th of February, and did not have any such possession or control of it by any servant as to constitute a valid attachment. In *Newton v. Adams*, 4 Vt. 437, which was an action of trespass brought by a sheriff to recover for property attached, it is said that, admitting that the plaintiff did not originally take a sufficient possession, yet we all agree that if he did subsequently and without any intervening attachment acquire a sufficient possession, the rule of law is satisfied and his attachment is valid.

On the morning of the 10th of February the defendant went to Reynolds' place and loyied the before-mentioned execution

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upon the horse-power and separator, and put his son in possession as keeper. His son remained in possession until night, when, without moving the property, he left the premises and the property in the same place and condition as when he went there. On the morning of the 11th of February the plaintiff went to Reynolds' place and took possession of the horse-power and separator, claiming to do so by virtue of said writ, and put Reynolds in as keeper, who agreed to keep possession of the same for him. His testimony tended to show that the writ had not then been returned, and that his return had not then been made upon it, and that he then had the writ with him; the defendant's testimony tended to show that his return had been made, and that the writ was returned on the evening of the 9th, and that he did not take it with him when he took the power and separator into his possession.

The court charged that what the plaintiff did on the 9th did not constitute a valid attachment, and that if he did what his evidence tended to show was done on the 11th, and then had the writ in his custody and control, it would be a good attachment. The court was requested to charge and explain to the jury that the custody and control of the writ did not mean that he must then have the writ with him or on his person, but the court declined to make the explanation requested; and in the charge, which is referred to, the court told the jury that if the plaintiff on the 11th was there with the writ, acting under its authority in doing what he did in attaching the property on that day, he would be entitled to recover. The jury might have understood from the charge that, in order to make the attachment valid it was necessary that he should have had the writ with him at the time the attachment was made, and that what the court meant by custody and control was that he should then have the writ upon his person. When the writ was delivered to plaintiff he became its legal custodian, and was entitled to the possession of it until he had completed the service; and if temporarily out of his possession, he might act under its authority until he was required to return it. It was



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not necessary that he should have had the writ with him when he made the attachment on the 11th, and if in doing what he did do he was acting under its authority and was so professing to act, it would be a justification to him and constitute a valid attachment, and the jury should have been so instructed. But under the charge the jury might, and probably did, limit their inquiry to the fact as to whether the plaintiff had the writ with him when he made the attachment.

Judgment reversed and cause remanded.

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 SARAH A. RICHARDS v. DAN. P. MOORE.

*Juror, Disqualification of. Alien. Practice. Motion to set aside Verdict.*

1. Alienage is a disqualification of a juror; and a verdict rendered by jurors, when one of them was an alien, will be set aside on motion of the defeated party, if the disqualification was unknown to him and his counsel.
2. Prior alienage is presumed from naturalization; thus, when one was naturalized after he acted as a juror, it was presumed that he was an alien before he acted; especially when it was found that he became a citizen by naturalization, and was of foreign birth.
3. The burden is on the defendant to show the alienage of the juror.

MOTION to set aside a verdict on the ground that one of the jurors was an alien. Heard April Term, 1887, Ross, J., presiding. Motion *pro forma* overruled, and judgment rendered on the verdict. The facts appear in the opinion.

*H. C. Adams* and *Geo. A. Ballard*, for the defendant.

The presumption of citizenship drawn from the fact of residence, ceases when the fact of foreign birth appears. So does

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the presumption of the regularity of a verdict, which only amounts to this, that irregularity will not be presumed. 2 Best, Ev. 360. The burden of proof then shifts. The probative force of the fact of residence is not equal to that of foreign birth. Birth creates citizenship in the country of birth.

The presumption of alienage drawn from foreign birth, is continuous and conclusive unless met by proof that the disability has been removed by some method known to the law. *Farr v. Payne*, 40 Vt. 615; 1 Greenl. Ev. s. 41; 2 Best, Ev. ss. 273, 405; 9 Reporter, 265; *Quinn v. Halbert*, 52 Vt. 353. The rule of the common law was that the place of birth determined the question of citizenship, with the exception of children of ambassadors. *Calvin's Case*, 7 Co. 1; *McIllain v. Coxe's Lessees*, 4 Cranch, 209.

*Powell & Brown* and *Cross & Start*, for the plaintiff.

The statute disqualifications of jurors must be taken advantage of by challenge; and the fact that a disqualified juror is allowed to participate in the trial of a case is not cause for setting aside the verdict, especially in civil cases. Proffatt, Jur. s. 172; Thomp. & M. Jur. s. 304; 8 Cent. Rep. 746; *Hassum v. Feeney*, 121 Mass. 93; *State v. Jackson*, 27 Kan. 581; *Croy v. State*, 32 Ind. 384; *State v. White*, 68 N. C. 158; *State v. Vogel*, 22 Wis. 471; *United States v. Gale*, 109 U. S. 65; *Green v. State*, 59 Md. 123; *Woodward v. Dean*, 113 Mass. 297. The defendant must overcome by proof the presumption that the juror was competent. Hilliard, New Trials, s. 3, c. 9; *People v. Chase*, 27 N. Y. 45, 63, 74; *People v. Pease*, 30 Barb. 588; *Egbert v. Greenwault*, 38 Am. Rep. 360; *Hammond v. Noble*, 57 Vt. 193.

To satisfy the court that the juror was not a citizen, it is not sufficient to prove that he was born in Ireland and was never naturalized. Proffatt, Jur. s. 116. It must be proved that his father was not a citizen by birth. U. S. Stat. s. 2172. Also that his father never made application to be

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naturalized. U. S. Stat. s. 2168. See *Wilmington v. Burlington*, 4 Pick. 173; 1 Pick. 247, n. 3; 5 Cow. 320; *Union v. Plainfield*, 37 Conn. 563; Abb. Tr. Ev. p. 91, n. 14; Whar. Ev. s. 208; *Hammond v. Noble*, 57 Vt. 193; 53 N. Y. 556.

The opinion of the court was delivered by

TART, J. The defendant moved the court below to set aside the verdict upon the ground that Conner, one of the jurors, was an alien. If he was, the proof showing that that fact was unknown to the defendant and his counsel, until after the trial, the motion should have been granted. *Quinn v. Halbert*, 52 Vt. 353. The counsel for the plaintiff have shown diligence in citing thirty-nine authorities from other jurisdictions to show that the disqualification of the juror could only avail the defendant as a cause of challenge, evidently overlooking the cases in our own State, in which a contrary doctrine has been established. *Briggs v. Georgia*, 15 Vt. 61; *Mann v. Fairlee*, 44 Vt. 672; *Quinn v. Halbert*, *supra*. The competency of the juror will be presumed until the contrary is shown; and it is incumbent upon the defendant to show the alienage of the juror. *Hammond v. Noble*, 57 Vt. 193. He has shown the foreign birth of the juror and his non-naturalization, by any act of his own, and the non-naturalization of his father; and, if reputation in the family is legitimate evidence, the foreign birth of the latter. It is unnecessary to pass upon this latter question as it is not requisite to a disposition of the case. We think that irrespective of any fact (or presumption drawn therefrom) prior to the trial, that the fact shown by stipulation, that Conner was duly naturalized in 1886, subsequently to the trial, and became a citizen of the United States and of Vermont, is decisive upon the question of his alienage. Why should we not give full force and effect to the naturalization proceedings and all presumptions naturally arising therefrom. The person was foreign by birth, had never, by any act of his own, been made a citizen; he went into court and

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by due process of law was naturalized. Is not prior alienage a logical inference from the fact of naturalization, and especially so in this case, because it is stipulated that by his naturalization he became a citizen of the United States and of Vermont? This, by implication, is saying that he was not before a citizen. Nothing being shown to the contrary, does not the presumption arise that prior to the proceedings he was an alien? We think if any claim is made by the plaintiff that Conner was a citizen prior thereto, that the proceedings were sham, mere form, and of no effect, the burden was upon him to show such facts. We think the presumption arising from the naturalization proceedings is, that prior thereto, Conner was an alien.

Judgment reversed, motion granted, verdict set aside, new trial granted, and cause remanded.

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## R. N. AUSTIN v. R. D. McCLURE.

*Statute of Limitations. Payment.*

A payment that will operate to revive a debt barred by the Statute of Limitations must be a voluntary one and made with the intent that it should be applied upon such debt. *Corliss & Way v. Grow*, 58 Vt. 702, distinguished.

ASSUMPSIT upon a promissory note. Heard on a referee's report, April Term, 1887, Ross, J., presiding. Judgment for the defendant. The case appears in the opinion.

*Farrington & Post*, for the plaintiff.

What the defendant *supposed* or *intended* at the time he furnished the last three items of sugar, has nothing to do with the right of the plaintiff to apply the same on the note. This fact standing alone would not defeat the creditor's right to his money. The sugar was furnished to apply on the note, or in fulfillment of the defendant's obligation to support. It was voluntarily furnished for one purpose or the other. The note was a subsisting obligation on the part of the defendant to pay the plaintiff. On the other hand, by the terms of the contract, there was no subsisting obligation to furnish the sugar. The defendant was not bound to contribute towards the support of the plaintiff and his wife, unless they should *live to need help*. This was the condition precedent to right of demand to furnish. They did not need help until the fall of 1883, after the delivery of the sugar. Under these circumstances, the plaintiff had the same right to apply the last three items of sugar on the note as he had to apply the previous ones kept in the same manner; and it is found that the defendant intended the sugar delivered previously as a payment on the note. Hence, the plaintiff

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was left to, and did apply the sugar on the only legal obligation against the defendant. The fact that the referee did not find that the plaintiff had, at the time the sugar was delivered, an intention of applying it on the note, does not bar him from so applying it. *Corliss & Way v. Grow*, 58 Vt. 702.

The fact that whatever either party in such a case intended, does not affect the legal right of the party unless that intention was expressed. If not expressed then, although ever so forcibly held, the law will apply according to justice and equity.

It is not the secret intention of mind. It is the intention of mind expressed that determines the application to be made, or any intention inferred from the circumstances of the case. *Robie v. Briggs*, 59 Vt. 443; *Roakes v. Bailey & Newcomb*, 55 Vt. 542; *Early v. Flannery*, 47 Vt. 253; *Langdon v. Bowmen*, 46 Vt. 512; *Pierce, Clark & Co. v. Knight*, 31 Vt. 701; *Wheeler v. House*, 27 Vt. 735; *Ayer v. Hawkins*, 19 Vt. 26; *Rosseau v. Cull*, 14 Vt. 83; *Boutwell v. Mason & Scott*, 12 Vt. 608; *Briggs v. Williams*, 2 Vt. 283.

*John A. Fitch* and *Henry A. Burt*, for the defendant.

The statute bar is a full defence to this suit, unless the plaintiff has shown and the referee found affirmatively that the defendant made a payment to apply on the note within six years of the bringing of the suit. As tersely stated by Justice POWERS in *Cleveland v. Dinsmore*, 59 Vt. 436, the question of fact is, was it a voluntary payment upon the note, and was it understood by the defendant that it was to apply on the note. In other words, does either of said endorsements cover an intended payment on this note. It is not the payment, but the acknowledgment of a subsisting debt, and the promise which the law may imply from the circumstances under which the payment was made, that removes the statute bar. It is found that the defendant, when he delivered the sugar, did not intend or expect that it would be applied on the note. *Robie v. Briggs*, 59 Vt. 450.

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The referee fails to find that the sugar was delivered or received as a payment upon any indebtedness, or that the plaintiff ever understood it as a payment in any sense. *Hayes v. Morse*, 8 Vt. 316; *Ayer v. Hawkins*, 19 Vt. 26.

The opinion of the court was delivered by

ROYCE, Ch. J. This is an action of assumpsit, brought to recover the amount due on a promissory note executed by the defendant made payable to the plaintiff, and dated November 26, 1866. The defence was the Statute of Limitations, and the case was heard upon the report of a referee. No question was made but what the plaintiff's right of recovery was barred, unless it was saved by the endorsements which appear on the note of April, 1880, 1881 and 1882. The referee has found that the said endorsements were made by the plaintiff at the same time and within two years of December 9, 1886; that the amounts represented by said endorsements were for sugar delivered by the defendant to the plaintiff during those years; that in June, 1879, the plaintiff told the defendant and his wife Jane, who was his daughter, that he intended to deed certain real estate to his son, R. A. Austin, and the said Jane, reserving to himself a certain farm; but on account of the financial difficulties in which the defendant was involved, he intended to deed said real estate to the said R. A. Austin with said reservation, and that when the defendant got his financial troubles straightened out the said R. A. Austin should deed one undivided half of said real estate to the said Jane, and that in part consideration therefor that the said R. A. Austin and the defendant and his wife were to support the plaintiff and his wife, in accordance with their station in life, if they should live to need help; that in accordance with said understanding the plaintiff, in June, 1879, deeded said real estate to the said R. A. Austin, and the said R. A. Austin, in accordance with the said agreement, on the 23d of January, 1880, deeded one undivided half of the same to the said Jane. There was no evidence that they needed help or support until the

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fall of 1883, when the said Jane spent several weeks in taking care of her mother in her last sickness. That the sugar that was delivered by the defendant subsequent to June, 1879, was delivered, supposing and intending that it was to apply towards the support to be furnished in accordance with the agreement which had been entered into, and would be accounted for in the final settlement with R. A. Austin; but there was no evidence that such intention was made known to the plaintiff. The referee further found that the defendant did not deliver any of said sugar intending or expecting that it would be applied on said note; and that he is unable to find that the plaintiff received the sugar intending at the time to apply it on the note. Upon the facts so found it is to be determined whether the delivery of the sugar was a part payment from which a promise to pay the residue of the note might be implied. The defendant neither directed, intended, nor expected that it would be so applied, and it is not found that the plaintiff at the time he received it intended to so apply it; so that if the plaintiff had the right to treat it as part payment, it must have been under the rule of law that permits the creditor, in the absence of any direction by his debtor, to say where payments made by him shall be applied.

Part payment is an implied acknowledgment of the existence of the claim upon which the payment is made, from which the law implies a promise to pay the balance, unless such implication is rebutted by something that transpired when the payment was made. *Corliss & Way v. Grow*, 58 Vt. 702. In order for a part payment to revive the claim as to the residue so that the law will imply a promise to pay it, it must appear that the payment was made upon the claim sought to be enforced. *Cleveland v. Dinsmore*, 59 Vt. 436. The mere fact of a sum of money having been paid by the defendant to the plaintiff is not enough to take a case out of the Statute of Limitations. Chitty on Contracts, 829; 2 Addison on Contracts, 886; Angell on Limitations, ss. 240, 241, 242, 243 and 244.



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The delivery of the sugar under the circumstances found by the referee was not such a payment as would in legal effect operate as an acknowledgment of liability, and from which the law would imply a promise to pay what might be due upon the note. Had the plaintiff the right to make the application of the sugar which he did make? In *Rosseau v. Cull*, 14 Vt. 83, it is said: "No principle perhaps is better established than that when the debtor makes no appropriation of money paid, generally the creditor may make his own application, unless there be something in the case to show a different expectation on the part of the debtor." Here, as we have seen, the debtor did not expect that the sugar would be applied upon the note, but did expect that it would be applied upon his obligation to support the plaintiff and his wife. In *Ayer v. Hawkins*, 19 Vt. 26, the court say: "The right to direct the application being universally conceded to the debtor in the first instance, regard is still had to his intention in the matter, whenever the facts and circumstances render that intention sufficiently clear and certain"; in *Wheeler v. House*, 27 Vt. 735, "that the court will in the application of payment carry out the intention of the parties, whenever that intention can be ascertained"; in *Early v. Flannery*, 47 Vt. 253, that "whenever the intention of the debtor is rendered sufficiently clear and certain, such application should be made as he intended"; in *Roakes v. Bailey & Newcomb*, 55 Vt. 542, that "if the debtor pays with one intent and the creditor receives with another, the intent of the debtor shall govern."

The cases referred to by counsel for plaintiff in which the creditor was allowed to make an application of payments, without any direction from the debtor, differ in their facts from those here found. In *Corliss & Way v. Grow*, which seems to be the one most relied upon, the plaintiff had two accounts against the defendant, one of his own, and the other the one upon which the suit was brought, and asked the defendant for money *upon the accounts*; whereupon the defendant paid him \$15 without giving any direction as to its appli-

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cation, which overpaid his account, and he credited the balance upon the other; and it did not appear that he intended it should apply anywhere else. The court said that, in the absence of any specific direction as to the application of a payment, the intent of the party making it, as ascertained from the circumstances under which it was made, may control the right to make it, and that the plaintiff had the right to apply the money to pay his own account and what remained upon the other.

A payment that will operate to revive a debt that is barred by the Statute of Limitations must be a voluntary one, and made with the intent that it should be applied upon the debt; and where it is found that the payment was not made with such an intent, but on the contrary was intended to be applied somewhere else, it is not such a payment as will revive the debt. The payment here made was of such a character, and did not revive the debt so as to give a cause of action for its recovery. And the judgment is affirmed.

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Moore v. Tanning Co.

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A. N. MOORE, SURVIVING PARTNER OF P. D. MOORE  
& CO., AND OTHERS v. THE SWANTON  
TANNING CO., AND OTHERS.

[IN CHANCERY.]

*Pleading. Decree. Accounting. Private Corporation.*

1. Where a bill was brought for an accounting under a contract, and the decree in the court below included an account which accrued just before the contract was made, and the prior account was carried forward into the statements made to the defendants and never objected to by them, but was treated as a part of the account sued for, it was held that there was no error in the decree, and if necessary, an amendment would be allowed to the bill to include the prior account.
2. The orators and two of the defendants were members of a private corporation, engaged in the tannery business. The stockholders voted to consolidate its business with a tannery owned by the orators in another state. That vote was carried out to the extent of transferring the personal property of the foreign tannery to the defendant corporation, but not the realty; *Held*, whether the purchase of real property in another state was within the corporate powers of the defendant, it should account for the actual value of what it received.
3. As no question was raised in the report as to the value of the property, it is presumed that the master allowed on legitimate evidence the actual cash value.

BILL in chancery for accounting. Heard on the pleadings and a master's report, April Term, 1887, Ross, Chancellor. Decree that the bill is taken as confessed against all the defendants except Wright & Hunter. The orator is to have a decree against the Swanton Tanning Co. for the sum of \$28,884.24 and interest since January 1st, 1887, and his costs with the right to take execution against the company, and have it satisfied upon any property of the company. The orator has no right to collect the dividends paid, nor have the company dissolved, and the bill is dismissed against Wright & Hunter without costs.

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A. L. Wright and S. N. Hunter were two of the defendants. The firm of P. D. Moore & Co. was composed of Perley D. Moore and Allen M. Moore, the latter being the surviving partner of said firm. The Swanton Tanning Co. is a private corporation organized at Swanton, Vermont, under the provision of an act of legislature relating to private corporations, approved November 23d, 1870. See Revised Laws, chap. 153.

The master found that the corporation was organized "for the purpose of purchasing and tanning hides, the manufacturing of leather and of any articles composed in whole or in part of leather, and the selling and vending of the same; that the capital stock of the corporation was fixed by its articles of association at \$25,000, divided into two hundred and fifty shares of \$100 each; that it was located and had its principal office and place of business at Swanton in the State of Vermont; that the officers of the said corporation were a president, three directors, a clerk and treasurer, chosen according to law; that the first meeting of said corporation was held at Swanton, April 9, 1874, at which meeting A. L. Wright, Perley D. Moore and Edwin S. Meigs, were elected directors of said corporation, and that at a subsequent meeting of said directors on the same day, Perley D. Moore was made president and Edwin S. Meigs clerk and treasurer of said corporation, since which time no election or appointment of directors or officers has been held or made."

The capital stock was owned as follows: A. M. & P. D. Moore, 118 shares; A. L. Wright, 118 shares; Barney, 10 shares; D. S. Meigs, 4 shares. Wright afterwards transferred his shares to S. N. Hunter, but still retained an interest in them. On October 13th, 1874, at Swanton, Vt., the following agreement was entered into between Perley D. Moore of Boston, Mass., and said corporation:

"The said party of the first part agrees and by these presents bind themselves, their heirs and assigns to furnish the necessary amount of money to stock and run the tannery of the said Swanton Tanning Co., at Swanton, Vt., for 7 per cent. interest on the capital so furnished, and 2 per cent commission for purchasing hides, bark and paying labor and all contingent expenses including insurance, etc., requiring money to do the

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leather manufacturing business, and 3 1-2 per cent. commission for selling the leather and all other products of said tannery, not guaranteeing the sales, for the term of five years from this date, no charges being made for travelling expenses, store or clerk hire, or any expenses attending to and doing the business in Boston, or in any other markets except what necessary clerk hire shall be necessary to do the business in Swanton at the tannery. The said party of the first part having possession of the said tannery and sole control of the running of it from this date and all funds that are expended and not provided for by the Swanton Tanning Co., for furnishing the tannery and curry shop for tools, etc., necessary to carry on the business, and all repairs shall be refunded to the said party of the first part by said Swanton Tanning Company and the said party of the first part are to keep a true and just account of all money so expended by them in said business and of all sales of leather, stock, etc., from said business, and render a true and just statement of the same to the said directors of said Swanton Tanning Co. at Swanton on the first day of January of each and every year during the term of this contract and all profits and losses made, after deducting money paid out in said business including interest, commissions, etc., shall be rendered to the directors of said company on the first day of January of each and every year during the term aforesaid, to be by them divided *pro rata* share and share alike among the several stockholders, and in consideration of the above agreements to be kept, done and performed by the said party of the first part, the said party of the second part agrees and by these presents bind themselves, their heirs and assigns to give immediate possession of said tannery building.

PERLEY D. MOORE & Co.

A. L. WRIGHT,  
E. S. MEIGS,  
PERLEY D. MOORE, } Directors of the Swanton Tanning Co.

“On August 1, 1879, the said contract was extended two years, to October 13, 1881. The said P. D. Moore took possession of the said tannery property and carried on the business until about October 1, 1882. There was no evidence that there was any express agreement to extend the contract beyond October 13, 1881, but the stockholders knew that the Moores were carrying on the business and made no objection.

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On February 18, 1881, a meeting of the stockholders of the tannery company was held at its office, at which all the stockholders were present, and on motion of Perley D. Moore, it was voted to consolidate the Malone tannery, now owned by P. D. Moore & Co., with the Swanton Tanning Co., said Moore & Co. taking stock in the Swanton Tanning Co. for the amount of \$15,000 in full for said Malone tannery with all the appurtenances thereunto belonging, including the real estate and all the tools and machinery now in said tannery."

The Swanton Tanning Co. took no further action in consolidating with the Malone tannery, which was in Malone, N. Y.

"On the 5th day of March, 1881, Perley D. Moore & Co. charged over to the Swanton Tanning Co. personal property at the Malone tannery to the amount of \$12,518.25, consisting of hides tanned and untanned, and in the process of tanning, bark and other materials used in tanning leather, and other personal property used in connection with operating the Malone tannery." \* \* \*

"After the 5th day of March, 1881, said Malone tannery was operated by Perley D. Moore & Co. in connection with and as part of the business of the Swanton Tanning Co." \* \*

"At the request of the solicitor of the defendants, Wright and Hunter, I find that not less than \$42,798.54, exclusive of interest and commission on purchases and sales were charged to the S. T. Co. by said P. D. Moore & Co., on account of the Malone tannery property and business as evidenced by defendant's Exhibit 1, which is a copy, so far as it goes, of orator's Exhibit 17 and 18, being the annual statements of January 1, 1881 and 1882, and of the books of Perley D. Moore & Co., and is in the handwriting of E. G. Moore."

It was found that the orators acted in good faith in this Malone transaction.

It appeared that eighty shares of the stock were issued to the Moores and Wright for 50 per cent of the par value thereof; and that they also became the owner of fifty-one other shares, which were originally issued to said Meigs. Meigs paid for the shares by conveying a woolen factory to the tanning company. The woolen factory was under mortgage, which was afterwards foreclosed. The Moores and Wright

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redeemed, and so 51 shares of stock were issued to them, which cost them less than the par value.

The prayer in the bill was for an accounting; that the dividends paid should be refunded and the same applied in paying the orators; that an order of sequestration issue against all the property and assets; that there be an order of contribution among the stockholders; and for a decree of dissolution of said corporation. The other facts appear in the opinion.

*C. G. Austin*, for the defendants.

The orators predicate their right of recovery by virtue of the contract of October 13th, 1874, and do not claim by their bill any other account than that which accrued under that contract, and the prayer of the bill asks only for adjustment of that account.

The report finds that the sum of \$6,391.81 of the orator's account accrued prior to the contract of October 13, 1874.

The actual capital stock paid in was only \$21,000. The company could not, without violating the statute under which it was formed, contract a debt for only two-thirds of the amount of the capital stock *actually* paid in, viz.: \$14,000. R. L. 3291; Acts of 1870, No. 6, s. 3. Eighty shares of the stock were conveyed to the orators and Wright for 50 per cent of their par value; and they received fifty-one of the Meigs shares on payment of \$2,000—the mortgages on the woolen factory. So the actual amount paid in for the stock was \$19,500. Two-thirds of this would be \$13,000, and this would be the limit of indebtedness which this private corporation might properly incur. Act of 1870, s. 3; *Booth v. Woodbury*, 32 Conn. 113; *Alley v. Edgecomb*, 53 Me. 446; 8 Ind. 34; 30 Ala. 461; *Leavenworth v. Morton*, 1 Kan. 431; 3 McLean, 111.

The indebtedness created on account of the Malone tannery is absolutely void. The orators had no right by virtue of the contract, nor by the articles of association or charter of the company to transfer the business of the company to the state

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of New York. The exercise of powers not conferred is equally illegal with the exercise of a prohibited power. *Green Bri. Ultra Vires*; 37 Cal. 543; *Vandall v. San Francisco Dock Co.* 40 Cal. 83; *Downing v. Mt. Washington Road Co.* 40 N. H. 230; *Bank of Augusta v. Earle*, 13 Pet. 519; *Orr v. Lacy*, 2 Dougl. 230. The vote of February 18, 1881, conferred no new powers. Rev. Laws, s. 3289; Mor. Corp. s. 940; *State v. Bailey*, 16 Ind. 46. The orators stand charged with notice, in fact and law. P. D. Moore was a director and president and it was his duty to protect the company against these wrongs.

*R. O. Sturtevant and H. C. Adams*, for the orators.

The vote of February 18, 1881, was valid and binding; it was a contract. *Fleckner v. Bank of United States*, 8 Wheat. 338, 353. It was not a contract *ultra vires*. It was an open, square business transaction. It was not outside the business in which the Swanton Tanning Co. were engaged. The property was delivered to the company, and accrued to its benefit. The articles of association disclose the nature of the company's business; but the details are not supposed to be embraced in them.

If the purchase of the Malone tannery property had been foreign to the business carried on by said Swanton Tanning Co. the doctrine of *ultra vires*, in one sense, might with some propriety be urged. But the purchase in fact included nothing but hides, tanned and untanned, tanning material, some tools, machinery and other personal property essential in carrying on the business. *Brice, Ultra Vires*, p. 39; 97 U. S. 659; *Bank v. P. M. R. R. Co.* 31 Vt. 491.

The doctrine of *ultra vires*, when invoked for or against a corporation, should not be allowed to prevail when it would defeat the ends of justice or work a legal wrong.

There was no error in view of the facts in including in the decree the prior account. *Lewis v. The St. Albans Iron & S. Works*, 50 Vt. 477.



The opinion of the court was delivered by

TAFT, J. No claim is now made by the orators as to matters embraced within the prayer of the bill, except such as relate to the accounts between the parties, and enforcing the collection of any sum found due them from the defendants.

Was there error in the decree?

I. The main portion of the account passed upon by the master accrued between the thirteenth day of October, 1874, and the cessation of the tanning company's business in 1882, under the written contract of the former date. Prior to the execution of the written contract, an account had accrued in favor of the orators amounting at the time of the contract to six thousand three hundred ninety-one 81-100 dollars. The account accrued just prior to the execution of the contract, and the character of the business done under the contract was evidently the same as that embraced in the prior account. It was in fact a continuation of the business begun soon after the formation of the company. The prior account was carried forward into the statements made to the defendant, was never objected to by them, was treated by them as a part of the account rendered under the written contract; and we think that after being so treated, it is too late for the defendant to now object to an allowance of it under a bill brought for an accounting under the contract. That account became a part of the account under the contract. Under the circumstances, we should not hesitate to permit an amendment of the bill to include the prior account did we deem it necessary, which we do not.

II. The only other question made by the defendant is denying the orators' right to charge the company with the personal property at the Malone tannery, amounting to 12,518 25-100 dollars, on the 18th day of February, 1881. We do not think that the right to charge the tanning company this sum depends strictly upon the legality of the vote of the tanning company at the latter date to consolidate its business with that of the Malone tannery. That vote was not carried out by the ora-

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tors taking stock in the company, or by a conveyance of the real estate to the company. Such purchase of real property in another state may, or may not, have been regular and strictly within the corporate powers of the company. But the acquisition of the personal property at the Malone Tannery was strictly within the authority of the orators under the contract of 13th October, 1874. They made all the purchases for the tannery, and we think that having taken the personal property under the form of a sale, the company having had the full benefit of it in every respect, that the orators should be allowed its value. The personal property at the Malone tannery was appraised by an agent of the orators and charged at the appraisal. The orators could not bind the company by an appraisal of their own. We wish to exclude the idea that this is impliedly sanctioned by the disposition of the case. We presume that the master allowed the actual cash value of the property; and no question is raised by the report in respect to the value of the property. We presume the action of the master was based upon legitimate evidence in that respect.

Decree affirmed, and cause remanded.

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Topsham v. Williamstown.

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ORANGE COUNTY, MAY TERM, 1887.

Present: ROSS, POWERS and VEAZEY, JJ.

TOWN OF TOPSHAM v. TOWN OF WILLIAMSTOWN.

*Pauper. Residence. Insanity. R. L. s. 2813.*

1. Insanity *per se*, occurring after a legal residence has commenced, and which, uninterrupted, would ripen into a legal settlement, does not, under the pauper law, suspend or hold in abeyance such residence, or affect the acquisition of a settlement, except so far as controlled by statute.
2. While under the statute—R. L. s. 2813—the time spent by an insane person in a lunatic asylum is not computed in settlement cases, it is computed when he is not in an asylum, though he is under guardianship.

APPEAL from order of removal of one Sally J. T. Ring, a pauper. Heard on an agreed statement, June Term, 1886, ROWELL, J., presiding. Judgment that the pauper was unduly removed. Affirmed.

It was agreed that said Sally was born and always lived or had her home in Topsham until her marriage in 1869, and ever since, as hereafter appears; that her household goods remained there until the most of them were sold by the overseer of the poor in said town in October, 1884; that the pauper was insane all the time from the appointment of a guardian, in 1872, and was controlled and supported by the guardian in said Topsham from her own means until the overseer took charge of her in June, 1884, since which time she has been supported by the town; that she had no fixed home, but her household furniture was stored in said Topsham; that since her marriage said Sally has not had any home in any other town than said

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Topsham, up to the time of making the order of removal ; that she never kept house, and only remained in one place so long as the guardian and those who took care of her could agree ; that many times she was compelled by force to stay at a particular place, but generally was controlled by persuasion and devices of all kinds ; that sometimes she left said town of Topsham, but was returned by the same means. The other facts are sufficiently stated in the opinion.

*R. M. Harvey*, for the plaintiff.

The legal settlement of the pauper is in defendant town, unless she gained one since the death of her husband. *Brookfield v. Hartland*, 10 Vt. 424 ; *Royalton v. West Fairlee*, 11 Vt. 438 ; *Newark v. Sutton*, 40 Vt. 261 ; R. L. s. 2811. It cannot be inferred that the pauper had a home in Topsham, because she had no home in any other town. *Middletown v. Poultney*, 2 Vt. 437 ; *Newbury v. Topsham*, 7 Vt. 410 ; *Bristol v. Rutland*, 10 Vt. 574. She never had any legal residence in Topsham after the death of her husband, or, at least, after the appointment of a guardian. It does not appear that she remained there continuously for seven years. She never had any fixed home anywhere ; and she was incapable of having or intending to have one at any place. *Woodstock v. Hartland*, 21 Vt. 563 ; *Ryegate v. Wardsboro*, 32 Vt. 414 ; *Ludlow v. Landgrove*, 42 Vt. 139 ; *Brownington v. Charleston*, 32 Vt. 411 ; *Jamaica v. Townshend*, 19 Vt. 267 ; *Hartford v. Hartland*, 19 Vt. 397 ; *Tunbridge v. Norwich*, 17 Vt. 493.

Some of the essential elements of a legal residence are capacity for choosing ; the fact that a choice was made and continued, with the fact of continual residence or home for seven years. All these facts must concur, but neither exists. If the guardian could will and act for his ward, it must appear that he did so as fully as she would be required to in order to gain a settlement. But the guardian could not thus act for her.

It is said *Holyoke v. Haskins*, 5 Pick. 20 : " It is clear that

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by our laws a guardian has the same power over his ward that a parent has over his child." Admit this, and then the case is with the plaintiff; for a parent cannot change the legal settlement of his unemancipated child by changing the child's residence. *Woodstock v. Hartland*, 21 Vt. 563; *Andover v. Canton*, 13 Mass. 547; *Salisbury v. Fairfield*, 1 Root. (Conn.) 131; 72 Me. 204; *Daniel v. Hill*, 52 Ala. 430.

The pauper retains the residence of her husband, because she had not gained one in her own right. *Bethel v. Tunbridge*, 13 Vt. 445.

*Heath & Willard*, for the defendant.

It is the rule of law that the old residence continues until a new one is acquired, so that every one has a residence somewhere. *Abington v. Bridgewater*, 23 Pick. 170. It would be a curious doctrine, and one that would introduce serious confusion into our law on the subject of taxation, voting, settlement of estates, and jurisdiction of courts, if a person ceased to reside anywhere as soon as he was afflicted with insanity. *Rockingham v. Springfield*, 4 New Eng. Rep. 372; 59 Vt. 521.

In Maine, Massachusetts and Connecticut, under statutes identical with ours, so far as the matter of residence is concerned, it is decided that persons are capable of residing, and do reside within the contemplation of the pauper law, though insane and under guardianship. *Gardner v. Farmingdale*, 45 Me. 537; *Auburn v. Hebron*, 48 Me. 332; *Corinth v. Bradley*, 51 Me. 540; *Chicopee v. Whately*, 6 Allen, 508; *Plymouth v. Waterbury*, 31 Conn. 515.

The legislature evidently thought that a special statute (Rev. Laws, s. 2813) was necessary to prevent the residence of a pauper removed to a lunatic asylum from continuing in the town from which he was removed. This section determined the decision of the court in *Peacham v. Weeks*, 48 Vt. 73. The guardianship does not suspend the residence. R. L. s. 281, cl. 5. If a person is forcibly moved away from

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the place where he has been residing, his residence still continues at the old place. *Northfield v. Vershire*, 33 Vt. 110.

The opinion of the court was delivered by

Ross, J. By the agreed facts, the pauper, Sally J. T. Ring, before her marriage, had her legal settlement in the town of Topsham. December 25, 1869, she married Moses Ring, whose legal settlement was in the town of Williamstown. During their married life to December 20, 1871, when he died, they resided in the town of Topsham. After his death she remained sane, and had her residence in Topsham, until May 14, 1872, when she was adjudged to be insane and a guardian of her person and property was appointed, by the Probate Court. She remained insane from that time until the making of the order of removal, and without aid from the town of Topsham until June, 1884, and during all that time the only home she had was in the town of Topsham.

On her marriage she took her husband's legal settlement in the town of Williamstown, and that has continued to be her last legal settlement, unless she has acquired one in her own right, since the decease of her husband. Nothing appearing to the contrary, it must be presumed that her residence in her own right from choice and intention, was in Topsham from December 20, 1871 to May 14, 1872. *Middlebury v. Wal-  
tham*, 6 Vt. 200; *Pittsford v. Chittenden*, 44 Vt. 382; *Stam-  
ford v. Readsboro*, 46 Vt. 606.

She remained in Topsham, and had there all the residence she had anywhere, for more than seven years from December 20, 1871, without receiving aid from the town, and gained a legal settlement unless her insanity after May 14, 1872, suspended, or held in abeyance, her right to gain a settlement, when once commenced. There is no statute governing such a case, and this is the first time, so far as we are aware, that the precise question has been presented to this court for decision. The only statute, which has a bearing indirectly upon the question, is sec. 2813, R. L., which provides, that in the trial

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of settlement cases, the time a person is a patient at a lunatic asylum, except inhabitants of the town in which such asylum is situated, shall not be computed as a part of the time required by law to gain a legal settlement, but shall be deducted therefrom. If the right and power to gain a settlement is suspended or in abeyance, during the time one is insane, there would be no force to the exception in regard to the inhabitants of the town in which the asylum is situated. The entire section leaves upon the mind the same impression which is made by the exception, that insanity, *per se*, does not suspend or hold in abeyance the acquisition of a legal settlement, except so far as controlled by statute. Under the statute, paupers are included in two classes, resident and transient. A resident pauper is one who has a legal settlement in some town in the state, and is residing in a town in which aid is needed, and liable to be removed to the town of legal settlement, or to an order of removal to such town. It is true that a person, having a legal settlement in some town in the State, may be in another town in need of aid under such circumstances as to be a transient pauper therein. To be liable to an order of removal, the pauper must have come to reside in the town in which he is in need of aid, in such a manner that, but for the aid, the residence, if continued for a sufficient time would ripen into a legal settlement in that town.

It has been held in *Londonderry v. Windham*, 2 Vt. 149 and in *Randolph v. Braintree*, 10 Vt. 436, that insanity does not prevent an order of removal, although such insane person is under guardianship.

These decisions proceed upon the basis that such insane persons, in need of aid, were residents of the town making the order of removal and that their residence was of such a character, as, if uninterrupted, would ripen into a legal settlement. This must be so, since it has been held that only one who is a resident, is subject to an order of removal. A person having a legal settlement in a town in the State, if in need of aid in some other town, where he is not a resident, as in jail, or sud-

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denly taken sick when on a journey, is held not to be subject to an order of removal, but must be treated as a transient pauper. So too must a person who is so idiotic as to be incapable of "coming to reside" or having any choice in regard to his place of abode. *Ryegate v. Wardsboro*, 32 Vt. 411; *Woodstock v. Hartland*, 21 Vt. 563.

Hence, if, by insanity or lunacy and the appointment of a guardian, the power to acquire a legal settlement is suspended or in abeyance, the paupers should be treated as transient paupers and not subject to an order of removal, as they were held to be in *Londonderry v. Windham*, *supra* and in *Randolph v. Braintree*, *supra*. Therefore, the effect of the decisions in these two cases, as well as that of sec. 2813, R. L., is, that insanity, occurring after a legal residence has once been begun—a residence which if uninterrupted, would ripen into a legal settlement—does not interrupt, suspend or hold in abeyance such residence.

We think that the legitimate result of these two decisions, and of sec. 2813, R. L., is to the effect that the pauper, Sally J. T. Ring, acquired a settlement in her own right, in the town of Topsham, by her residence therein subsequently to the death of her husband. This holding is in accord with the decisions of other courts of last resort.

In *Chicopee v. Whately*, 6 Allen 508, it is held that insanity occurring after a person has become an inhabitant of a town will not prevent his acquiring a settlement by living therein the required number of years. The instructions of the trial judge, that if the pauper, being capable of choosing a residence, went to the town with intent to reside there, the domicile, thus acquired would not be changed, or suspended, if he afterwards became insane, and that such insanity would not prevent his gaining a settlement, was held to be without error. The decisions, cited by defendant's counsel of the Supreme Court of Maine and of Connecticut, are of the same tenor and effect.

The judgment of the County Court is affirmed.



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## EZEKIEL TUCKER v. SUSANNAH PRESTON.

*Assumpsit on a quantum meruit for Work. Interest.*

1. Assumpsit on a *quantum meruit* will lie to recover what one's services are reasonably worth, where the parties supposed that they had entered into a contract in regard to compensation, but, through a failure to understand each other, their minds never met.
2. In an action to recover for labor extending through several years, where there is no express contract as to compensation, there is no error in allowing interest on the balance due at the end of each year, if this was the method of ascertaining the sum due; and in such case the question of demand does not arise.

ASSUMPSIT in general counts. Heard on a referee's report, December Term, 1886, WALKER, J., presiding. Judgment for the plaintiff. Affirmed.

The referee found that the action was assumpsit, and that the plaintiff filed a specification, to which the defendant pleaded the general issue and offset with specification, but defendant also claimed that plaintiff had no cause of action; that plaintiff in 1878 was sixty-two or sixty-three years old, and defendant an aged widow lady; that plaintiff worked as a laborer for the defendant on her farm at her request from March, 1878, to July, 1885; that the plaintiff claimed there was no special agreement as to what he should receive for his services, but that, in the January following the commencement of his work, they had some talk about that matter, and that defendant then said to him she wanted him to stay with her as long as she lived; that she would give him a home as long as she lived, and if he outlived her he was to have her property.

The defendant claimed that plaintiff's residence with and services for defendant were by virtue of a verbal contract by

which both parties understood and agreed that the plaintiff was to have a home with her during his lifetime, rendering such service as he was capable of, and receiving from her such care, attention, nursing, food, and clothing as he required ; that the plaintiff had no reason to be dissatisfied with her performance of her part of the contract ; that, for all the services rendered during the entire period of the plaintiff's residence with the defendant, his board, clothing, care, etc., with payment of his taxes, and the privilege he exercised of working elsewhere and retaining the pay he might receive, were a fair compensation.

Both parties substantially agreed as to what the talk was in the January after the plaintiff went to the defendant's, except that the defendant denies that anything was said about her property if he outlived her.

The referee's finding continued :

" I find that the plaintiff worked for defendant from March 1, 1878, to the following January, with no understanding or agreement as to what he was to receive for his services ; that thereafter he supposed and believed he was working and making his home with the defendant under the agreement which was then made, as he understands it, and now claims it to be ; and I find that the defendant supposed and believed that he was thereafter working for her and making his home with her under the agreement as she then understood it and now claims it to have been. I therefore find that in fact there was really no mutual contract or understanding between them. I further find that the plaintiff left the defendant because he supposed and believed from reports, and her acts and hints to him, that she wanted to get rid of him, and that if he did not leave she would throw him on the town ; and, from the evidence and the circumstances in the case, I find the fact that he had good reason to believe that the defendant wanted to get rid of him and he had good reason to believe that, unless he went away from the defendant, she would throw him on the town for his future support.

" It further appeared that the defendant's grandson, who had lived with his grandmother all the while the plaintiff was there, having arrived at the age of twenty-two or twenty-

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three years, went to Mr. Haywood, one of the selectmen of Tunbridge and acting as one of the overseers of the poor for said town, a short time before the plaintiff left defendant, and said that something had got to be done; they had kept him (the plaintiff) about as long as they could, for the reason that he was blind, and that his grandmother was going away soon; and in consequence of this application, Mr. Haywood, acting in the capacity of overseer of the poor for the town of Tunbridge, made some effort to inquire into the affairs of the plaintiff.

“The defendant claims that this application to the overseer of the poor by her grandson was not authorized by her, and that her grandson never knew, until after this application was made, by what understanding the plaintiff was staying with the defendant, and it did not appear that he did know. It did appear that the defendant made no effort to quiet the mind of the plaintiff or allay his suspicions in the matter, and that the plaintiff never said anything to the defendant about it.

“If from the foregoing facts the plaintiff can recover, then I find that his services for the defendant for the first three years, or from March 1, 1878, to March 1, 1881, were reasonably worth \$50 per year—\$150, \* \* \* to which should be added the balance of interest reckoned to December 21, 1886, of (if the plaintiff is entitled to interest) \$71.16.”

*W. B. C. Stickney*, for the defendant.

If the contract had been as the plaintiff claimed—that he was to have her property if he survived defendant—the case seems analogous to that of service rendered in expectation of a legacy, and there could be no recovery. *Martin v. Wright*, 13 Wend. 460; *Raynor v. Robinson*, 36 Barb. 130.

It does not appear that the defendant understood that plaintiff was mistaken as to the contract, or that she would have been unwilling to carry it out. She should have had an opportunity to exercise her option. *Scott v. Littledale*, 27 L. J. Q. B. 201.

It does not appear that she has violated any part of what the plaintiff understood was agreed; or that his mistake would

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work any injury. If it would, the remedy would be in equity. 1 Story, Eq. Jurisp. s. 140.

The ground of abandonment was the alleged refusal to fulfill; and the plaintiff should show that the refusal was absolute and unqualified. *Cutter v. Powell*, 2 Smith, Lead. Cas. 30, n.

The services were given under mutual mistake, and defendant is not liable to pay money. Add. Cont. s. 31; *Lunay v. Vantyne*, 40 Vt. 501.

In an implied contract, the law supplies that which is presumed to have been intended by the parties. 1 Wait, Act. & Def. p. 73, s. 4; *Watson v. Stever*, 25 Mich. 386.

The defendant has fulfilled the supposed agreement, except the conditional part, and the condition has not arisen. *Munro v. Butt*, 8 El. & Bl. 738.

The plaintiff is not entitled to interest. *Brainerd v. Champlain Transp. Co.* 29 Vt. 154; 1 Am. Lead. Cas. 623, n.

A demand was necessary. *Case v. Osborn*, 60 How. Pr. 187; *Newell v. Keith*, 11 Vt. 214.

*D. C. Denison & Son*, for the plaintiff.

There was no express contract between the parties; therefore the whole case rests on the implied contract for work and labor. *Paddock v. Kittredge*, 31 Vt. 378.

The opinion of the court was delivered by

Ross, J. The result of the facts found by the referee is that the plaintiff went to work for the defendant at her request, worked nearly a year without any special agreement in regard to the compensation which he was to receive, or when it was to be paid; then the parties supposed they had entered into a permanent contract in regard to his services, past and future, but by failure to understand each other, their minds never met, and the plaintiff continued to work several years for the defendant. This leaves the plaintiff's entire work, performed at the defendant's request, without any agreement in regard to

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compensation or payment. He can therefore recover for it in assumpsit on *quantum meruit*. The referee has found how much the plaintiff's services thus performed were reasonably worth, and how much he had received in payment. The defendant contends that the referee has allowed too much interest, if the plaintiff is allowed to recover. We do not think this contention can be maintained. The referee in determining what would be a reasonable compensation for the plaintiff's services found a certain sum due the plaintiff yearly, and diminished this sum by whatever he had received in payment, and allowed interest on the balance from the end of the year. This was his method of ascertaining the sum which the plaintiff reasonably deserved to receive as compensation for his services for the plaintiff. No question of a demand, or the necessity of a demand, before the allowance of interest, arises upon the facts reported by the referee. His method of ascertaining the sum which the plaintiff reasonably deserves to receive as compensation for his services makes the interest on the balance due yearly a part of the sum total as much as the yearly balances.

The judgment is affirmed.

## BENJAMIN H. STILL AND WIFE v. J. W. BUZZELL.

[IN CHANCERY.]

*Deed absolute in form, when a Mortgage. Fraud. Pleading. Practice. Bill to Redeem. Costs. Mortgagee in Possession. R. L. ss. 1955, 4155.*

1. A deed absolute in form, but given to secure a debt and also to cover the grantor's property for the purpose of preventing attachment, is a valid mortgage between the parties; and, on payment of the debt, the grantee will be ordered to reconvey, on the ground that he cannot take advantage of his own fraud upon others to defraud the grantor.
2. Although a bill must be framed to the circumstances that exist when the action is brought, yet the decree will be affirmed when it is correct in form and amount, if the bill has been formally amended; thus, when the bill was brought to redeem, the debt had not been paid; but it had been,—and there was a balance due the orator,—prior to the hearing before the master, by applying on the debt the use of the premises occupied by the defendant in possession under his mortgage; *Held*, (a) That the orator would have been entitled to a decree, if his bill had been properly framed; (b) That the bill should have contained an offer to pay any balance found due the defendant on accounting; (c) That the cause should be remanded for amendment of the bill, and the decree ordering the defendant to redeed and pay the balance due the orator, should be affirmed.
3. The orator, after the condition of the mortgage had been broken, rented the premises (a pasture), and the mortgagee notified the tenant that he must pay the rent to him; and the mortgagee also turned some of his own stock in in that season, and afterwards used the pasture to some extent; *Held*, on a bill to redeem, that the defendant took possession, and was accountable for such rents and profits as he ought to have received.
4. When a debtor, owing both a secured and an unsecured debt, makes a general payment without any direction, and no application is made, it should be applied to the unsecured debt.
5. In a suit to redeem the defendant was not allowed costs on false issues raised by his answer, and costs were allowed the orator.

BILL praying that the defendant be ordered to redeed certain lands. Heard on the pleadings, master's report and

exceptions thereto, December Term, 1886, WALKER, Chancellor. Decree for orators. Affirmed.

The prayer of the bill was that defendant be decreed to convey the lands described in the bill to the oratrix and account for the rents. It was found by the master that the oratrix owned the premises in question, and on October 30, 1878, she and her husband, the orator, conveyed them to the defendant by warrantee deed. At this time an overdue mortgage was on the premises, amounting to \$250, due to one Miller, and the defendant agreed to and did take up this mortgage. The deed was not intended to be absolute, but was given and received to secure the Miller mortgage debt, and the defendant agreed to redeed to the oratrix when that debt was paid. The master also found that one object, in conveying the Miller lot, so-called, to the defendant, was "to cover this property and prevent any other creditors troubling the orator and oratrix." The orator owed the defendant a general account and also two sets of notes, called the Miller notes and the Frary notes; but it was found that the conveyance of the Miller lot was to secure the defendant for taking up the mortgage on that lot and not the other debts.

It was found, as to the \$21 mentioned in the opinion, that it was paid by E. L. Still, the orator's son, without any agreement as to where it should be applied, and that no application had been made at the commencement of the suit. The bill alleged that the deed was given to defendant to secure him for taking up the Miller notes, and "to prevent the creditors of your orator from interfering in the orator's use of said land;" that defendant agreed to redeed on payment of said Miller notes; and that they had been paid. The bill was served May 22, 1883.

The decree provided that the defendant took possession of the Miller lot and should be treated as a mortgagee in possession, and should account to the orators for the reasonable rental value of said lot for four years, commencing from the spring of 1882, which is found at \$25 per year by the master,

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leaving a balance due the orators of \$24.06; that, if the defendant would excuse himself from accounting for such rents and profits, he must show that he used reasonable means to procure a tenant, or derive benefit from the premises; that it does not appear that the defendant was in fault in not collecting the rent for the year 1881, and the value of the use by the tenant and defendant respectively is not found; that the \$21 paid by E. L. Still on account of the orator, without any agreement or direction, be applied upon the general account between the parties, and not upon the Miller debt; that the defendant reconvey to the oratrix the premises described in the bill,—which were conveyed to him by deed, October 30, 1878, as security for the payment of the Miller debt,—free and clear of all incumbrance; that the right of the orators to relief is not defeated by the fact that the deed was executed in part to cover the property from attachment; and that defendant be denied his cost, and the orators recover their cost subsequent to the filing of the answer. The other facts are sufficiently stated in the opinion of the court.

*John H. Watson*, for the defendant.

The \$21 paid by E. L. Still, should be applied on the general account, as the rule is that the most precarious security should be extinguished first. *Briggs v. Williams*, 2 Vt. 283; *Pierce v. Knight*, 31 Vt. 701; *Allen v. Lyman*, 27 Vt. 20.

Full payment is a condition precedent to redemption (2 Jones, Mort. s. 1070), and the burden is on the mortgagor to show it.

In the absence of an agreement, there is no legal satisfaction of the mortgage by receipt of the rents. They must be first applied by the judgment of the court. 2 Jones, Mort. s. 1115. The mortgagee is not chargeable so long as the premises are not redeemed. 2 Jones, Mort. s. 1116; *Seaver v. Durant*, 26 Vt. 103. When a tenant is in possession under the mortgagor, the mortgagee must either cause an actual eviction of the tenant or become his landlord by a new contract, in order to extin-



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guish the liabilities of the mortgagor. *Stedman v. Gassett*, 18 Vt. 346; *Partington v. Woodcock*, 5 Nev. & Man. 672; s. c. 6 Ad. & El. 690; *Evans v. Elliot*, 9 Ad. & El. 343.

The relation of landlord and tenant cannot be created without the consent of both parties. And when the tenant quits and refuses to pay, there is no express or implied contract, and nothing short of an actual eviction will constitute possession in the mortgagee. *Stedman v. Gassett*, *supra*; *Babcock v. Kennedy*, 1 Vt. 462; *Brown v. Storey*, 1 Man. & Gr. 117.

After the premises were vacated by the tenant, the possession was in the mortgagor. 1 Washb. Real Prop. 533.

So long as the mortgagor is in possession, he is entitled to the rents and profits. *Walker v. King*, 44 Vt. 601; *Mayo v. Fletcher*, 14 Pick. 525; *Hooper v. Wilson*, 12 Vt. 695.

A mortgagee will not be held for anything more than the actual rent and profits received. 2 Jones, Mort. 1123.

The taking possession must be distinct and unequivocal. COLLAMER, J., in *Hooper v. Wilson*, *supra*; *White v. Maynard*, 54 Vt. 575.

The defendant is not liable for interest on the rents. *Breck-enridge v. Brooks*, 2 A. K. Marsh, 341; 1 Washb. Real Prop. 588.

The right of action must exist when the suit is brought. A decree must be based upon the case as then made. *Barrett v. Sargeant*, 18 Vt. 365; *Blairdell v. Stevens*, 16 Vt. 179; *Cowner Wilson*, 33 Vt. 1. See 1 Pom. Eq. Jurisp. ss. 388, 1219.

The bill should have contained an offer to pay any balance due. 2 Jones, Mort. 1093.

It was a fraudulent conveyance, participated in by both parties, and was void as to creditors: R. L. ss. 1955, 4155; *Prout v. Vaughn*, 52 Vt. 451; *McLane v. Johnson*, 43 Vt. 48; Bump. Fraud. Conv. 195, 204; but it must stand as between the parties. A right of action cannot arise out of fraud. *Holman v. Johnson*, Cowp. 343.

If a party conveys away his property with intent to defraud

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his creditors the law will not aid him to recover it back. *SAVAGE*, Ch. J., in *Roberts v. Jackson*, 1 Wend. 478. See *Harvey v. Varney*, 98 Mass. 118; 1 Pom. Eq. Jurisp. 397, 916, 940; 1 Jones, Mort. s. 627; *Schmidt v. Opie*, 33 N. J. Eq. 138; 7 Met. 520; Bump. Fr. Conv. 486; *Bowland v. Martin*, 4 Cent. Rep. 760.

The defendant should be allowed his costs, according to the general rule in a suit to redeem. 2 Jones, Mort. s. 1111.

*S. B. Hebard*, for the orators.

The defendant was in possession and should account for the reasonable rents and profits. He was bound to use reasonable diligence, either in procuring tenants, or in other ways realizing from the premises. *White v. Maynard*, 54 Vt. 575; *Shaeffer v. Chambers*, 6 N. J. Eq. 548; *Sanders v. Wilson*, 34 Vt. 318.

The defendant is not entitled to costs. He set up false claims and failed. *Waterman v. Cochran*, 12 Vt. 699; *Stearns v. Wisley*, 30 Vt. 661.

The orators prevailed in the sole issue, and should be allowed costs. *Day v. Cummings*, 19 Vt. 496; *Weston v. Cushing*, 45 Vt. 531.

The court will not reverse a decree solely on a question of costs. *Mott v. Harrington*, 15 Vt. 185; *Ricker v. Clark*, 54 Vt. 289; *Joslyn v. Parlin*, 54 Vt. 670; *Hastings v. Perry*, 20 Vt. 272; *Sanborn v. Kittredge*, 20 Vt. 633.

The opinion of the court was delivered by

Ross, J. The master has found that the deed of the Miller lot, though absolute in form, was, between the orator and oratrix and the defendant, given to secure the defendant for taking up the Miller notes then resting upon the premises, which the defendant agreed to do, and did subsequently do, and to cover the property and prevent any other creditors from troubling them. The bill is brought to compel the defendant to redeed the premises, the complainants claiming that they

had paid the defendant the entire debt secured by the deed. The defendant contends that he has not been paid what the deed was given to secure, and that if he has been, the complainants are remediless, because the deed was given and accepted to prevent any other creditors from troubling them.

I. Upon the facts found by the master, the debt secured by the deed had not all been paid at the time the bill was brought, but had been at the time of the hearing, by the use of the mortgaged premises. The complainants do not offer in the bill to pay the defendant any balance which might be found due him, on full accounting. This is necessary in a bill to redeem if the orator would avoid the risk of a balance being found against him. Strictly, the bill must be framed to the circumstances that exist when it is brought, and the orator must recover if at all, upon the allegations of his bill when applied to the circumstances then existing. In this view, even if the master's findings are approved, the orator and oratrix would not be entitled to relief without amendment of the bill. But as such amendment would effect no rights now, unless it influenced the question of costs, the Court of Chancery would probably have allowed it to be made, without terms. Hence, this question is somewhat unimportant.

The only contention bearing upon whether the mortgage debt had been paid, when the master heard the case, is whether upon the facts found the defendant is to be charged for the use of the premises from the spring of 1881. The controlling facts on this subject are, that, in the spring of 1881, the orator let the pasture to Persey Bacon; the defendant notified Bacon that he must pay the rent to him, and Bacon thereupon abandoned the pasture; the defendant then or before then turned some stock into the pasture; and the complainants understood that he had taken possession of it. After that year, no one had possession of the pasture, except the defendant, who turned in oxen, but when, or how much, did not appear. We think these facts show that the defendant, not only assumed control of the pasture in 1881, as against Bacon, but took possession

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of it himself, and was thereafter accountable for the rents and profits which he ought to have received from the use of it. After what he did in 1881, if he would divest himself of liability for the use of the pasture, he should have notified the orator that he surrendered the possession to him. No claim is made that the amount allowed by the master is too great, if the defendant is liable to account for the use of the premises during those years. This left at the time of the decree a balance due from the defendant which he was decreed to pay to the orator and oratrix.

We think the court of chancery properly disposed of the item of \$21, paid the defendant by the son of the orator. The decree on the accounting between the parties on the facts found was correct in amount, and in form, if the bill had been formally amended to adapt it to the circumstances as they existed, when it was brought.

II. Can the defence prevail, because the deed was given and taken absolute in form, not only to secure the defendant for paying the Miller notes, which were about to be foreclosed, but to cover the property and prevent the creditors from troubling the orator and oratrix? In other words, can the defendant set up his own fraud, entered into with the complainants, to defeat their other creditors? If he can, then the statute to prevent fraud, in equity even, can be made the means of a fraud; for, in that case, the defendant can receive payment in full for the debt for which the deed was given, and still hold the premises conveyed as security for the payment of that debt. Secs. 1955 and 4155, R. L., both declare that fraudulent and deceitful conveyances of bonds, etc., "shall, as against the person, whose right, debt or duty is so intended to be avoided, his heirs, or assigns be utterly void."

These provisions of the statute, have, at common law, and generally, been held to make the contracts good and enforceable between the parties and only void as to creditors whose right, debt or duty is attempted to be avoided. The opinion in *Carpenter v. McClure*, 39 Vt. 9, is a full and careful consider-

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ation of this subject. That case holds that a note given for such a purpose between the parties was valid and enforceable at law. In the case at bar the contract between the parties, as found by the master, is a mortgage, and he has further found that the complainants have paid it in full. They are entitled to the premises freed from any claim, on the part of the defendant; for that was the legal effect of the contract, between them. Under the decisions of this court, the deed though absolute in form, could be shown, as between the parties, to be a mortgage. Without objection or exception, the deed in this case was shown to be only a mortgage between the parties. It was valid as such between them though void as to any other creditors of the complainants. It was valid between them as mortgage and will be enforced as such, especially, when a refusal to enforce it as such, under what had been done under it, would make it an operative fraud in the hands of the defendant, upon the orator, or allow him to take advantage of his own fraud upon others, to defraud the orator and oratrix.

III. The defendant claims that the decree was erroneous in regard to costs. This court rarely disturbs a decree in chancery solely on the question of costs. Costs in chancery are largely in the discretion of that court, dependent upon the circumstances of each case. We should be slow to reverse a decree upon a question of costs alone. This court has not been furnished with a copy of the defendant's answer; but the decree plainly indicates that, in that the defendant claimed to hold the premises for debts which were not secured on them, and that he failed in the defence he undertook, and for that reason was refused costs and the orator allowed costs on the false issues which he raised in his answer. If this was so, the court properly refused him costs and allowed the orators costs.

Decree of the Court of Chancery is affirmed and cause remanded, with right in the orator to ask leave to amend his bill in the particular indicated on such terms, if any, as the Court of Chancery may impose.

WILLIAM J. TARBELL v. DANIEL AND GEORGE  
TARBELL.

*Covenant. Pleading. Evidence. Practice. Remittitur.  
New Trial.*

1. In an action for breach of covenant in a deed of land it is not necessary that the declaration should contain an allegation that the cost and expenses of litigating the title were ascertained and notice of the amount given to the defendants and a demand made therefor; for notice is not a condition of liability, nor of the gist of the action.
2. Certain evidence, *q. v.*, as to the value of the land was properly admitted.
3. In an action for breach of covenant where the verdict was larger than the plaintiff's claim in his specification, it is a proper case for the allowance of a *remittitur*.
4. But a *remittitur* should not be allowed, unless it clearly appears just what the excess in the verdict is; and the verdict should be set aside if it does not so appear.
5. The Supreme Court rendered judgment where the parties finally agreed as to the excess in the verdict, thereby increasing the *remittitur* allowed by the court below.
6. **NEW TRIAL.** The affidavits of jurors impeaching their verdict are not admissible in support of a petition for a new trial; and such petition also will be dismissed when there is pending on exceptions a motion for the same purpose.

**COVENANT** in two counts. The first was for breach of covenant of ownership of a piece of land, six feet wide and fifty feet long, in the village of South Royalton, from which the plaintiff was ousted by Aaron N. King; the second for a breach of covenant to warrant and defend said land, claiming as damages plaintiff's time and expenses in the chancery suit in which said King recovered the same.

Trial by jury, December Term, 1886, WALKER, J., presiding. Verdict for the plaintiff. See *Tarbell v. Tarbell*, 57 Vt. 492. Motion for new trial.

It was conceded that plaintiff was evicted from said strip of land in 1879; and the principal question on this trial was as to the damages.

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The plaintiff testified in his own behalf and appraised the land at \$500. The defendant used one Adams as a witness, who testified on direct examination that the land was worth \$12 per front foot, or \$72. On cross-examination he was asked what his appraisal would be, if Wm. Tarbell was occupying all the land immediately in the rear as far as the common under a perpetual lease.

The defendant objected to this question; but he was permitted to answer, and did as follows: "I should say with a perpetual lease it would be worth twice the money—\$24 per foot." The other facts are sufficiently stated in the opinion.

*Lamb & Tarbell and J. J. Wilson*, for the defendant.

The second count was fatally defective in that it did not allege that the costs were ascertained and notice of the amount given to the defendants. 1 Swift Dig. 442. Where matter is more peculiarly within the knowledge of one of the parties than the other notice is necessary, though the terms of the contract do not require it. The amount of costs, time and expense were peculiarly within the knowledge of the plaintiff and of no one else. The defendants had no knowledge or source of knowledge from which they could ascertain the amount thereof. 1 Chit. Pl. (12th Am. Ed.) 327; Gould Pl. Chap. 4, ss. 15, 16. *Wright v. Smith*, 19 Vt. 110, was an action upon an award, that the defendant should pay the plaintiff his taxable costs in a suit pending between them, and it was held that no action would lay upon it without averment and proof of notice to the defendant. *Sylvester v. Downer*, 18 Vt. 32, was assumpsit upon a guarantee, that when a certain note should become due, it should be good and collectible, and it was held on motion in arrest, that it was necessary to give notice before commencement of suit, that proper effort had been made to collect the demand and that it had proved unavailing. In *Barnes v. Parker*, 8 Met. 134, the court say: "Where the thing is more properly within the knowledge of the plaintiff than the defendant, notice is required to be given

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before commencement of the action." Comyns Dig. Pleader (C) 73; *Safford v. Stevens*, 2 Wend. 158; 1 Chit. Pl. 330. The defect was not cured by verdict. 1 Chit. Pl. 673, 680; Gould Pl. chap. 10, ss. 22, 25; *Vadakin v. Soper*, 1 Aik. 287; *Harding v. Cragie*, 8 Vt. 581; *Wright v. Clements*, 3 B. & Ald. 353. Where there are several counts and one is defective, judgment will be arrested. *Bloss v. Kittridge*, 5 Vt. 28; *Needham v. McAuley*, 13 Vt. 68; *Dunham v. Powers*, 42 Vt. 1.

*Heath & Willard*, for the plaintiff.

The testimony given by Adams was properly admitted. *Swan v. Middlesex*, 101 Mass. 173; *Shaw v. Charleston*, 2 Gray, 107. The motion in arrest of judgment was properly overruled. 2 Tidd Pr. 925; 1 Chitty Pl. 673; 1 Swift Dig. (2nd Ed.) 776; *Colt v. Root*, 17 Mass. 229, 235; *Bliss v. Arnold*, 8 Vt. 252, 256; *Smith v. Paul*, 8 Porter, 503, 505.

The established precedents do not contain any such averments as the defendants imagine to be necessary. 1 Chit. Pl. 546; Oliver's Prec. 476; Anthon's Am. Prec. 319; 2 Swift Dig. 478, 567. The defendant's objection proceeds upon a misapprehension of the nature of the action. The material question is, has the covenant been broken? If it has then damages must follow according to the rule of damages appropriate to this form of action. The principal claim is for the value of the land. The rest is an incident.

The court properly allowed the plaintiff to remit. *Persival v. Spencer*, Yelverton, 45; *Hemmenway v. Hicks*, 4 Pick. 497; *Crab v. Nashville Bk*, 6 Yerger, 332; *Johnson v. Robertson*, 1 Mo. 615; *Baldwin v. Porter*, 12 Conn. 473, 486; *Callernan v. Shaw*, 24 Iowa, 441, 450; *Smith v. Brush*, 11 Conn. 359, 369; *Lear v. McMillen*, 17 Ohio St. 464, 471; *Stickney v. Bronson*, 5 Minn. 215, 222; *Doyle v. Dixon*, 97 Mass. 208; *Chapin v. Bourne*, 8 Cal. 294; *Dublin v. Murphy*, 3 Sandf. 19; *Rea v. Harrington*, 58 Vt. 181, 191.



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The defendants cannot be heard in this court, that the verdict was still "excessive and unwarranted by the law of evidence;" because the whole evidence is not before this court. *Parsons v. Chapman*, 11 Iowa, 294; *State v. Bonds*, 2 Nev. 265, 266; *Dawley v. Hovious*, 23 Cal. 103, 104; *Atkins v. Scott*, 19 Wis. 136; *Wadsworth v. Harrison*, 14 Iowa, 272.

The opinion of the court was delivered by

VEAZEY, J. The defendants moved in arrest of judgment for alleged defects in the second count, in that it did not allege that the costs and expenses in the King suit were ascertained and notice of the amount given to the defendants and demand made therefor.

This count set out the fact of King's claim and suit against this plaintiff, notice thereof by the plaintiff to the defendants, request to defend, neglect so to do, result in favor of King, defence by this plaintiff, costs and expense thereof; to wit, \$1,000, and payment by this plaintiff, which he claimed with the value of the land.

The defendants in their brief admit their liability for the land, and that they undertook by force of their covenants to repay all costs, loss and expense the plaintiff might be put to resulting from any failure of the title, but claim they were entitled to notice of the amount thereof, and therefore an averment of notice was necessary, and this on the ground that the matter was peculiarly within the knowledge of the plaintiff.

The rule is that when actual notice of any fact to the defendant, or special request, is, either by the terms or the nature of the contract, the *condition* of his liability, such notice, in the one case, and such request in the other, is of the *gist* of the action, and must therefore be specially averred in the declaration. Gould's Plead. 3d ed. chap. 4, s. 15, and authorities in note *y*. The gist of the action is that without which there is no cause of action. Gould, chap. 4, s. 12. The gist of the action in this case was the breach of the covenants of ownership and to warrant and defend. The distinc-

tion between the cases cited by the respective counsel is well expressed by ROYCE, J., in *Sylvester v. Downer*, 18 Vt. 32: "The general rule is, that where a person undertakes, in positive terms, for some future act to be done by himself, or a third person, he is to take notice of the performance or non-performance of the act, and notice from the other party is not required. Such are all the cases of absolute guaranty. But when he only stipulates that the other party shall be able, by his diligence, to effect a certain object, the case is different. He is not then supposed to know, nor does he assume to know, the measures taken, or the result. Notice is therefore required, for the reason assigned by Judge SWIFT, that it would be against principle to admit a man to be sued when he has no knowledge of the existence of the demand. 1 Swift, Dig. 436."

The warranties in this case were absolute, not conditional. In case of a guaranty that a demand against a third person is or shall be good and collectible, the condition is implied that the person taking such guaranty shall use all reasonable diligence to collect the demand of the debtor, therefore a declaration upon such guaranty must aver notice to the guarantor that proper efforts have been made to collect the demand from the debtor, and that they have proved unavailing, as was held in *Sylvester v. Downer*, *supra*. But where the undertaking is an absolute guaranty for another, it is unnecessary to aver notice of failure of performance on the part of the other. *Williams v. Granger*, 4 Day, 444; *Lent v. Padleford*, 10 Mass. 230. The cases are cited by the defendants where the promise was to pay taxable costs, and where it was held that the amount being peculiarly within the party's own knowledge, notice of the amount must be averred, as in *Wright v. Smith*, 19 Vt. 110. In those cases it may well be regarded that notice of the amount on account of peculiar knowledge is a *condition* of liability implied from the nature of the contract, and therefore is of the gist of the action as much as the promise and breach are. The defendant had assumed nothing except to

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pay when the amount was determined. In the case at bar the defendants had covenanted to warrant and defend. This covenant was broken. From this breach damages arose, consisting of the value of the land, and, as an incident, the cost and expense of doing that which the defendants had assumed as a primary obligation. We fail to see anything in the nature of the contract implying that notice should be a condition of liability. No case is cited, and I have found none where it was so held. The established precedents contain no averment of the kind here claimed to be essential. In the numerous cases for breach of covenants in deeds, in this jurisdiction and elsewhere, involving the question of right to include this element of damages, I find but one where the report shows expressly what the averment was as to notice and where the question of the necessity of such averment was pointedly raised as here, and there the decision was that costs of defence and counsel fees are recoverable although not specially stated in the declaration. *Richert v. Snyder*, 9 Wend. 417. SAVAGE, J., said: "The costs of the defence and of counsel fees were also proper, if the plaintiff's declaration was sufficient to admit them. The plaintiff in his declaration claims damages generally, and surely should be admitted to prove those damages which were necessarily consequent upon a prosecution against him, and his defence against that prosecution." In many of the cases where it was held that costs and expenses of defending the title in another suit were recoverable as an element of damage, the fair implication is that the declaration contained no averment of notice and demand. As a specimen, see *Pitkin v. Leavitt*, 13 Vt. 379. WILLIAMS, Ch. J., there says: "As to the legal costs and expense in the action of ejectment, the case of *Smith v. Compton*, 3 Barn. & Ad. 407, is a very decisive authority, not only that there may be a recovery on the covenant when no notice had been given of the former suit in ejectment, but also that the recovery should be for the necessary cost and expenses in that suit, as well as for the value of the land." We hold that recovery as claimed may be had under the second count.

Another cause alleged in the motion in arrest is that the jury allowed "a large amount of damages or interest to the plaintiff which were not warranted by the law or evidence."

The action is covenant in two counts, the first being for breach of the covenant of ownership of a piece of land described; the second, for breach of the covenant to warrant and defend the same, as above set forth. Under the second count the plaintiff filed a long and detailed specification of his claims. The exceptions show that the items of these specifications were the subject of minute investigation and of careful instruction to the jury, to which no exceptions were taken. A special verdict was taken on this branch of the case. The only exception reserved to any ruling of the court on the trial was to the admission of the testimony of one Adams as to the value of the land, in respect to which we hold there was no error. But on the motion in arrest it was claimed by the defendants that the special verdict was larger than the plaintiff claimed in his specification. This was admitted by the plaintiff, and he offered to remit the excess, and asked for judgment for the amount of the verdict, less this excess; and judgment was so rendered, the amount remitted being \$144.01, which was doubtless supposed to be, and possibly was, the exact amount of the excess. To this ruling and judgment the defendant excepted.

First, was this a proper case for the allowance of a *remittitur*? It was held as early as the reign of James I., in an action on the case on a promise, that though a plaintiff may never recover more than what he declares for, yet if after such verdict he releases all the damages but those for which he declared, and have judgment for the balance, it is good. *Persival v. Spencer*, Yelverton, 45. In an action sounding merely in damages, the plaintiff can recover no more than the amount laid in the declaration. If a verdict is found for more he may release the surplus, and take judgment for the amount declared for, but if judgment be entered for a greater amount it is error. 1 Rol. Abr. 784; Sayer on Dam. 238; 1 Saund. 285, n. 6; *Gratz v. Phillips*, 5 Binney, 564. See also the author-

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ities in plaintiff's brief. There are some exceptions noted in the books but they are not applicable here. We see no reason why the rule should not apply where the plaintiff states his claim in specifications. Plainly, a defendant should not be called upon to defend beyond the plaintiff's claim in any case.

But it is now claimed that the whole excess was not remitted, and the specifications are put into the hands of this court to enable us to see whether this claim is true. The exceptions state in one place that the amount remitted was the entire excess of the verdict above the amount of the specifications. If that had been the only statement on this point it would probably be conclusive, but it is not. The exceptions further state that the defendant's counsel claimed, *among other things*, that there was an error in the computation of interest made by the jury, to the amount of \$144, which was agreed to by the plaintiff's counsel, and thereupon the court allowed the plaintiff to remit that amount. Moreover the specifications are in such shape that we are unable to determine with certainty just what they aggregate. We therefore think that the fair construction of the exceptions is that the County Court did not actually find what the excess was.

A *remittitur* cannot be allowed and forced upon the defendant unless it clearly appears just what the excess of the verdict was. The court must be able to see and must determine this, and may not assume it. If unable to so determine, the judgment should be arrested, the verdict set aside, and a new trial granted. But if the parties agree as to the amount of excess, the court may take that as the true amount. The defendant's counsel now claim that the total amount was \$269 more than the jury intended, and agree that a deduction of that amount from the verdict would bring the judgment within the amount of the specifications. The plaintiff's counsel, although denying that the excess would come to this sum, yet consent to it and ask that the *remittitur* be increased to that amount. There was no error on the part of the court in the main trial. The error of the jury was, we think, solely clerical in computing the

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items of the specification. The only error of the court was in allowing a *remittitur* after verdict of an assumed excess of the verdict above the amount claimed, without that amount clearly appearing and being determined.

But as the County Court would have been warranted in rendering judgment in accordance with the present claim of the defendant and offer of the plaintiff, if such claim and offer had been made then, we think this court may in like manner act upon the claim and offer and render such judgment as the County Court could have rendered. This will cure all error that is established.

Judgment reversed and judgment for the plaintiff for the amount of the judgment below, less \$125, remitted—with costs in the County Court lessened by the defendant's costs in this court—the reversal being with costs to the defendant in this court.

In support of the petition for a new trial filed in this court and heard with the exceptions, the affidavits of five jurors were appended. In those affidavits the affiants testify to the method of making up the amount of the special verdict, and in substance add that they disallowed certain items in the specifications amounting to \$125, and intended to deduct that amount from the total amount of the specifications. The special verdict shows it was not deducted. It is the settled rule in this State that affidavits of jurors may be read to exculpate themselves from alleged fault, and to sustain their verdict, but not to impeach it; *Downer v. Baxter*, 30 Vt. 467; and under this rule it was held that the affidavits of jurors, after they have separated, to show upon what ground the verdict was rendered, were properly excluded. *Sheldon v. Perkins*, 37 Vt. 550.

Under these authorities the affidavits in question furnish no legal ground for setting aside the verdict, and were inadmissible.

Another ground for dismissing the petition is that there was and is pending on exceptions the motion for a new trial for the same cause. *Mann v. Fairlee*, 44 Vt. 672.

Petition dismissed with costs.

## WASHINGTON COUNTY, MAY TERM, 1888.

Present : ROYCE, Ch. J., ROSS, POWERS and TYLER, JJ.

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HOMER W. HEATON AND ANOTHER v. WELTHY J. SAWYER.\**Homestead. Divorce.*

1. A married woman under our statute—R. L. s. 1897—loses her inchoate right to a homestead in the premises of her husband when she is divorced from him; and if in such case the custody of the minor children is decreed to her, they cease to be a part of their father's family and lose all right to his homestead.
2. And a mortgage executed solely by the husband is valid when the wife subsequently obtains a divorce; and, on his decease, if the custody of the children was decreed to her, neither she nor they have a homestead in the premises as against the mortgagee.
3. And where the wife and children on the granting of the divorce moved from the premises and were absent two years, it was held to be an abandonment of the homestead.

EJECTMENT to recover the seisin and possession of a farm of land in Berlin. Heard on an agreed statement, March Term, 1887, VEAZEY, J., presiding.

Judgment *pro forma* and without hearing for the plaintiff for the seisin and possession of the farm in question except the two pieces set to Norman D. Sawyer in his distributive share in his father's estate; and it was also *pro forma* adjudged that the defendant or her children have a homestead right in the excepted pieces to be set out, if this judgment is sustained. Both parties excepted. The facts appear in the opinion.

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\* Heard May Term, 1887,

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*T. J. Deavitt and Heath & Willard*, for the defendant.

The plaintiffs have no right or title to this homestead. A married man's sole deed does not convey any interest in the homestead. R. L. s. 1904; *Abell v. Lathrop*, 47 Vt. 375; *Day v. Adams*, 42 Vt. 516; *Canfield v. Hard*, 58 Vt. 217.

In *Abell v. Lathrop*, 47 Vt. 375, it is determined that under circumstances like those in this case the homestead right still continued and could be asserted after decree of foreclosure. "A divorce obtained by the wife will not deprive her of her homestead rights acquired during coverture in her husband's real estate, where she continues to reside with her children." *Blandy v. Asher*, 72 Mo. 27; *Van Zant v. Van Zant*, 23 Ill. 566; *Bonnell v. Smith*, 53 Ill. 575; *Thomp. Home & Ex. ss. 1, 82*.

The divorced wife being charged with the custody of the children, continued the head of the family and kept the homestead. *Sellon v. Reed*, 5 Biss, 125. She and the children never abandoned the homestead. *Larabee v. Wood*, 54 Vt. 452. Constant occupation is not required. *West River Bank v. Gale*, 42 Vt. 27. Even if the defendant has no right to a homestead, nevertheless the children have. *Blandy v. Asher*, 72 Mo. 27; *Callwalden v. Howell*, 18 N. J. L. 138; *Moore v. Dunning*, 29 Ill. 135; *White v. Clark*, 36 Ill. 285.

The case of *Bland v. Asher* was a similar one to the case at bar. The homestead exemption is humane in its character, and the statute should receive a liberal construction in view of the objects aimed at by it. *Jewett v. Guyer*, 38 Vt. 218; *True v. Morrill*, 28 Vt. 674; *McFlary v. Bixby*, 37 Vt. 254.

*J. H. Lucia*, for the plaintiffs.

The first part of the judgment was correct, so far as it went. R. L. s. 1250; *Chapin v. Scott*, 1 D. Chipman, 41; *Dodge v. Page*, 49 Vt. 137; *Canfield v. Hard*, 58 Vt. 217. The error consisted in limiting the recovery to a part instead of extending it to include the whole farm.



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The second part of the judgment was erroneous because it is wrong on principle and contrary to authority.

The theory of the law is that the "widow or minor children," or "widow and minor children, if there are both," on the death of the "housekeeper or head of a family," take the homestead. But the divorced woman is not the wife and does not become the widow. *Thomp. Home & Ex. s. 8*; *Bishop Mar. & Div. s. 705*; *Whitsell v. Mills*, 6 Ind. 229; *Chenowith v. Chenowith*, 14 Ind. 2; *Dobson v. Butler*, 1 Mo. 8; *Moore v. Heyeman*, 27 Hun, 68; *Matter of Ensign*, 3 Hun, 152; *Webster Dict.* as to word "widow"; *Worcester Dict.*; *Rapalje & L. Law Dict.* The Heaton & Reed mortgage became operative and included the homestead as soon as the divorce was granted. *Whiteman v. Field*, 53 Vt. 55. Mrs. Sawyer had an inchoate homestead right in the premises covered by the Heaton & Reed mortgages, now owned by the plaintiffs, as she did not join in the conveyance; but this right is absolutely cut off by the divorce.

"A divorce obtained by a wife bars her homestead right in her husband's property, unless such right is reserved by the decree of divorce." *Wiggin v. Buzzell*, 58 N. H. 329. The homestead law of New Hampshire is in effect similar to our own. *G. S. Chap. 124*.

In *Brandon v. Brandon*, 14 Kan. 324 the court say: "In granting a divorce whether on account of the fault of the wife or the husband, the court has power to award to her the possession of the homestead." *Wood v. Davis*, 34 Iowa, 264; 14 Ind. *supra*; 37 Hun, *supra*.

Mrs. Sawyer has acquired no homestead rights since the divorce. She took possession under foreclosure of her alimony mortgage; but since November, 1876, when the foreclosure of the plaintiffs' mortgages became absolute, her possession was that of a trespasser. *Calderwood v. Tevis*, 23 Cal. 335; 53 Iowa, 172; *Mann v. Rogers*, 35 Cal. 316; *McClurken v. McClurken*, 46 Ill. 327.

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The opinion of the court was delivered by

Ross, J. The controversy is whether the defendant has a homestead in the premises sued for. She was the wife of Norman D. Sawyer, and while such, had an inchoate homestead right in the premises against all the claims now held by the plaintiffs except the Lydia Sawyer mortgage, which was given before she became the wife of Norman D. Sawyer. This mortgage did not cover the entire premises. While she was living with Norman D., as his wife, he executed three mortgages of the entire premises, which are held by the plaintiffs, and have been foreclosed. She did not join in the execution of either of these mortgages. After the giving of these mortgages, and after five children had been born to them, in 1873, the defendant procured a divorce from Norman D., and the custody of the five minor children. She received as alimony to herself \$1,000, and to the children \$1,000, and Charles H. Heath, Esq., was appointed trustee to hold and manage the children's \$1,000, and both sums were secured by a mortgage from Norman D. on the premises. She then left the premises with the children and resided for two years in Montpelier. Norman D. failed to pay the alimony as ordered by the court and required by the mortgage, and the mortgage was foreclosed, and the decree became absolute in April, 1875. She was put in possession of the house and land on the westerly side of the road, not covered by the Lydia Sawyer mortgage, under a writ of possession issued to enforce the foreclosure of the mortgage securing the alimony to herself and children. She with the children have remained, and still are in possession of this portion of the premises, and claims a homestead right therein. She has also been in possession at times of the whole farm. In 1875 the plaintiffs procured a foreclosure of the three mortgages given them by Norman D. Sawyer, making Norman D., the defendant, and Charles H. Heath, trustee of the five minor children, and Lydia Sawyer, defendants. They prayed to be allowed to redeem the mortgage to Lydia Sawyer, and did redeem it. The defendants all appeared by

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solicitor, and a guardian *ad litem* of the five minor children was also appointed and appeared. No mention was made in the bill that the defendant and the minor children claimed a homestead in the premises ; and so far as appears the bill was allowed to be taken as confessed by all the defendants, and the decree became absolute. Norman D. lived in the house on the westerly side of the highway with the defendant and her children, as their tenant, until his death in 1885. These are the substantial facts agreed upon by the parties as determinative of their rights. On these facts the defendant claims that she has a homestead in the house and land on the westerly side of the highway which was not covered by the Lydia Sawyer mortgage ; or, if she has not such a homestead, the children have, and she can defend the suit in ejectment against her claim in the right of the children ; and it is agreed that the right of the children to a homestead therein shall be determined in this suit.

In examining these claims it will be helpful to keep in mind the statutory provisions in relation to the homestead right. It is a right wholly created and regulated, in regard to its conveyance and descent, by statute. By sec. 1894, R. L., it is given to a housekeeper or head of a family, and must be used or kept by such housekeeper or head of a family as a homestead. All who take an interest in the homestead, other than the housekeeper or head of a family, take through him, and because of their relations to him. The whole purpose and scope of the homestead exemption were and are to secure a home to a family. All the provisions are to that effect. If the housekeeper, or head of a family, is a married man, his conveyance of the homestead, except for certain purposes named, is inoperative so far as relates to the homestead provided for by statute, unless his wife joins in the conveyance. In *Whiteman v. Field*, 53 Vt. 554, it is held that its conveyance by the husband is only inoperative against the rights of the wife and minor children.

The object and purpose of the statute in creating the home-

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stead have been fully accomplished so far as the wife and minor children are interested therein, when they legally cease forever thereafter to be a part of the family of the housekeeper or head of a family. This view is supported by sec. 1898, R. L., which provides that the homestead, on the death of the housekeeper or head of a family, shall descend to and vest in the *widow* and minor children, if he leaves any such. By this section the interest taken by the minor children terminates on attaining majority. By the decree of divorce procured by the defendant, with the custody of the minor children decreed to her, they thereafter ceased to be a part of the family of Norman D. Sawyer. She without remarriage could never become his widow. The minor children, without a change in the decree, could never become or constitute a part of his family, over whom he could exercise parental control, or to whom he owed the duty of personal care and support. By the decree she was given \$1,000 in lieu of the rights already acquired in his estate, and the children the same amount for future support and education. They never thereafter were legally a part of the family of Norman D. Sawyer. While he lived with them on the premises, he was their tenant. He occupied a position in subordination to them. To them he was no longer the housekeeper or head of a family. Immediately upon procuring the divorce they withdrew from the premises, and were absent for two years. This was an abandonment of whatever rights they theretofore had in them as a homestead. The decree of divorce had separated them from Norman D. Sawyer, as their housekeeper or head of a family. They only returned on the foreclosure of the mortgage securing the payment of the sums decreed as alimony, and for the support and education of the minor children. They were then put in possession in the enforcement of the decree of foreclosure against Norman D. Sawyer, and not as a part of his family. The mortgage thus foreclosed and enforced, was subsequent to the mortgages held by the plaintiffs and which the plaintiffs have also foreclosed. The mortgage to the defendant and her minor children

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derived all its force and vitality from the deed of Norman D. Sawyer. It could only convey such interest in the premises as he then had. So far as he was concerned, except the right to redeem, he had conveyed away all his rights therein by the three earlier mortgages foreclosed in favor of the plaintiffs. By the divorce the defendant lost the inchoate right to a homestead in the premises that existed when the plaintiffs' mortgages were given; for she could not thereafter, without remarriage, become the *widow* of the mortgagor, which relation she must sustain, to have the homestead descend to, and become perfected in her, upon his decease. By the divorce the minor children were taken from the custody and control of the mortgagor, were assigned a portion of his estate for their support and education, and, while the decree remained unchanged, could not legally be members of his family, under his control and subjection. Under these circumstances he owed them no duty to provide them a home. Under the decree they were taken by the mother from his home. Such removal was an abandonment of the premises as their home. They never returned to it except in enforcement of the mortgage securing to them \$1,000 for support and education. In that right they are now occupying a portion of the premises, and not in the right of a homestead derived from their father. During the last years he only occupied under the right which the widow and minor children acquired by the mortgage and as their tenant. The right of the widow and minor children under their mortgage from him was subordinate to the rights which the plaintiffs acquired by his earlier mortgages. Hence, neither the defendant nor minor children have any right in or to any portion of the premises superior to the rights of the plaintiffs thereto.

The judgment of the County Court is reversed, and judgment rendered for the plaintiffs to recover the possession of the premises, and the cause is remanded for the assessment of the damages.

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CLARK KING v. TIMOTHY DAVIS, ADM'R, AND  
A. O. CUMMINGS, ADM'R.\*

[IN CHANCERY.]

*Mental Capacity. Undue Influence. Expectancy.*

To make a binding contract a party must possess capacity enough to understand and comprehend both the nature and effect of the transaction. Thus, the assignment of an expectancy will be set aside when executed by a woman whose mind was so impaired by age that, while she understood the effect of the assignment, she did not its nature, and who was not able to distinguish her own debts from those of others, or to discriminate whether in equity they belonged to her to pay; and when undue influence was exercised to procure the assignment.

BILL of interpleader. Heard on the report of special masters, September Term, 1886. POWERS, Chancellor. Affirmed.

It was decreed that the assignment executed by Polly Gould and John Gould to the said A. O. Cummings, administrator of Henry M. Cummings, of their expectancy in the estate of Lucinda Cutler, mentioned in said report, be set aside and held for naught; and that the defendant Davis, administrator of Polly Gould's estate, is entitled to the fund paid into the court by the orator, with its accumulations, and the same is decreed to him to hold as assets of said Polly's estate, and that the defendant Davis is entitled to recover his costs against the defendant Cummings, to this date.

The masters found:

“David Gould deceased some time in the fall of 1861, leaving a will whereby he bequeathed to his wife, Polly, a life estate in his home farm in East Montpelier, and to his son,

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\* Heard May Term, 1887.

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John Gould, 2d, the remainder, subject to the payment by John of certain other legacies therein named. From David's decease to the death of John, some time in the spring of 1883, Polly and John occupied the farm together, John never having married; and, after the death of John, Polly remained upon the farm until late in the fall of the same year, when she was removed to Montpelier into the family of a grandson-in-law, where she remained until her death, June 29, 1884, at the age of ninety-three years, lacking a month.

"Lucinda Cutler, a sister of Polly Gould, deceased April 4, 1874, leaving a will providing that the residue of her estate, after the payment of all other legacies, should remain in the hands of her executor, or, in case of his death, resignation, or inability, in the hands of a trustee to be appointed by the Probate Court, for a term of ten years after her decease, after the expiration of which term said residue with its accumulations 'to go and descend to her legal heirs to be divided according to law;' which will was duly probated, and Addison Peck appointed executor, who administered for a time and was succeeded by Clark King, duly appointed administrator with the will annexed.

"April 30, 1872, Polly and John mortgaged said farm to Lucinda Cutler, to secure their note of that date for the sum of \$700, signed by Polly and John. August 22, 1873, Polly and John again mortgaged the farm to H. W. Heaton to secure two notes of that date, one for the sum of \$720, one for the sum of \$115, and a note of April 29, 1873, for the sum of \$103.50, all signed by Polly, and the first and last named by John. The \$115 note was witnessed; both these smaller notes were given for personal property, named in the notes, by said Heaton bid off at sheriff's sale upon executions against John, at the request of Polly and John, at the dates of the notes respectively; and a lien was reserved in the notes on the property in each note named. This mortgage also covered a piece of land in Montpelier known as the 'Somerby Place,' of which Polly then owned an undivided half. August 22, 1873, Polly and John again mortgaged said home farm to Dennison Taft to secure a note of that date for the sum of \$790, signed by Polly and John; which debt it appeared was incurred for improvement of the buildings on the place. September 19, 1874, John executed still another mortgage of the farm to Avery Cummings to secure a note of that date, signed by him, for the sum of \$800.

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“The mortgage to Dennison Taft, at some time after its execution, came into the hands of William N. Peck and was by him foreclosed at September Term of Washington County Court of Chancery, 1875, at which term decree was passed with one year's redemption expiring November 10, 1876. Neither Polly and John nor Cummings redeemed, and the decree became absolute as against Polly and John and Avery Cummings. Soon after the decree became absolute, Henry M. Cummings purchased the rights of said Peck, taking from him a quit-claim deed of the farm, dated May 3, 1877; and March 1, 1877, said Henry M. also received a deed from Polly and John of the Somerby Place—a quit-claim deed. The foreclosure against Polly and John bereft them of all their property, save, perhaps, a small amount of personal property and their interest in the Somerby Place, subsequently conveyed to Henry M. as above set forth. They were poor.

“The encumbrances prior to the Taft mortgage still existed; and Henry M. paid to the executor of Lucinda Cutler and to said Heaton their claims, and so secured to himself absolute title to the farm. The amount of encumbrances, including the decree, at the date of the expiration of the decree was \$3,019.43.

“After Henry became the owner of the farm in the manner above narrated, Polly and John continued to occupy the farm just as they had done before, presumably under some arrangement with Henry M.; but what that arrangement was cannot be stated, as there was neither writing nor living witness produced with definite knowledge to tell; nor can it be ascertained whether an arrangement of some kind was made before or after Henry M. purchased the Peck decree, or whether he purchased the decree by the procurement of Polly and John or at his own motion. All that was shown about this is learned from defendant, A. O. Cummings, who was a witness in his own behalf, and who had some knowledge, in a general way, of his brother Henry's affairs; and he supposes the arrangement to have been that Polly and John were to pay Henry M. 6 per cent. on the money invested by him in the farm, and were permitted to stay there at the sufferance of Henry M. he being the absolute owner.

“Henry M. Cummings deceased about August 8, 1881, and immediately thereafter A. O. Cummings was duly appointed administrator of his estate. Among Henry M. Cummings' papers, his said administrator found the two smaller notes



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described in the Heaton mortgage, and a note for the sum of \$1,000, dated December 1, 1876, payable to Henry M. on demand, signed by Polly and John, and witnessed by F. V. Randall. The note was called in the trial 'the Randall note.' The \$115 Heaton note was payable to Heaton or order, and when found by A. O. Cummings did not bear Heaton's indorsement. A. O. Cummings procured Mr. Heaton to indorse this note without recourse after Henry's death and after the making of the assignment hereinafter spoken of. Within two or three days after the death of Henry M., A. O. Cummings, having then been appointed administrator, went up to the farm and had an interview with John about these matters, and also made some general talk with Polly about her remaining on the farm, and about paying for the use of farm. Subsequently A. O. Cummings had two or more interviews with John at Montpelier in relation to the business, and it was suggested that John and his mother make an assignment of their expectancy in the estate of Lucinda Cutler, to secure the said Cummings for the past indebtedness and for their future occupancy of the farm; and so it was arranged between Cummings and John that Cummings should come up to the farm and have writings executed to accomplish that purpose. According to this arrangement with John, on December 13, 1881, a time previously agreed upon between Cummings and John, Cummings with a lawyer repaired to the farm to consummate the business. On that day, at the farm, Polly and John executed to A. O. Cummings, as administrator of the estate of Henry Cummings, in writing, under seal, an assignment of all their interest in the estate of Lucinda Cutler, with power of attorney to receive and receipt for such sum as should be coming to them, or either of them, from the administrator of Lucinda Cutler's estate, to an amount sufficient to pay said Cummings the indebtedness therein named. The indebtedness named in the assignment is the said Randall note, the said two smaller notes named in the Heaton mortgage, a note of \$1,250 that day executed by said Polly and John to A. O. Cummings, administrator, and such further indebtedness as should arise under a lease of the farm that day, executed and hereinafter more particularly described. At the same time A. O. Cummings, administrator, executed to Polly a lease of the farm from that time to the first day of April, 1884—about the time the ten years after the death of Lucinda Cutler would expire—with a provision that it should terminate at all events with the death of Polly, at the annual rental of \$175.

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"After Polly's death, A. O. Cummings sold the home farm at forced auction sale for the sum of \$2,550, a sum which he testifies was 'a good deal less than its value,' though he got all he could for it, after making diligent effort to get more at private sale. After Polly's death, Timothy Davis was duly appointed administrator of her estate. Said Davis claimed from Clark King, administrator with the will annexed of Lucinda Cutler, whatever was coming to Polly as heir of Lucinda Cutler; and A. O. Cummings, administrator, claimed the same by virtue of said assignment. Thereupon King brought the bill in this case, and the court ordered the said Davis and Cummings to interplead, and these masters were appointed to hear them. King has paid into court the fund here in controversy, being the sum of \$3,370.80.

"Davis charges mental incapacity on the part of Polly at the time of the execution of the assignment, and, upon this charge of mental incapacity rests the issue in the case. Upon either side of this issue was introduced a great number of witnesses, who gave their opinion respecting Polly's mental and physical condition during the last ten years of her life, with more or less detail of her circumstances and surroundings.

"From this testimony is found: Up to within fifteen years of her death, Polly was a woman of more than ordinary business capacity and understanding. John was her only living son; and for him she entertained great affection, and in him had great confidence. He was addicted to the excessive use of intoxicating liquor, and was 'easy going' and shiftless. They lived together upon the farm, John having the outdoor and financial management of affairs, and Polly managing indoors, herself doing such work as she was able, which for the four or five years next before John's death, was very little. John became in his later years so shiftless that he neglected to cut all the hay, and even gathered fence for firewood. His careless and unthrifty management of the farm and their financial affairs—his shiftlessness—brought them to a condition of poverty in 1875, when they were foreclosed as hereinbefore set forth, notwithstanding that, with ordinary industry and management, the farm would have afforded them an abundant living.

"Notwithstanding this, Polly's confidence in John was unshaken. After the foreclosure, and up to John's death, his utter worthlessness was apparent to all but his mother. Polly herself loved strong drink, and sometimes partook of it to

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intoxication. John ministered to his mother's desire in this behalf, and furnished her with her 'warm drink,' as she called it. The masters think that this attention on his part in no wise diminished her affection for or confidence in him. In 1883, during John's last sickness, some of the neighbors called the attention of the overseer of the poor of the town to the fact that Polly was in need, whereupon he, with one of the selectmen, went to the farm to look into the matter, and interviewed Polly respecting her needs and situation. Polly insisted to them that she had everything she wanted except that, since John had been sick, she had no one to bring her her warm drink. The fact is that at that time she was not comfortably provided for. The overseer at that time did nothing for her relief, and, as far as appeared, never did. This was after the execution of the assignment, but her condition of mind then was not substantially different from what it was at the time of the assignment. Polly was induced to execute the assignment by John. Cummings' negotiations were mostly with John, and John influenced his mother."

The masters do not think that John himself, who was present that day, had a very intelligent comprehension of the details of that business, though it is not claimed that he was incapacitated from transacting business affairs. It is not insinuated that Mr. Cummings intended any wrong, but it is stated that the making up of the \$1,250 note was in a great measure "guesswork" on his part. The masters entertain some doubt respecting the justice and equity of all the debts named in the assignment. They do not quite understand why the two smaller notes named in the Heaton mortgage were kept on foot as a subsisting debt. They were named in the mortgage, and, by Henry M. Cummings, paid when he redeemed the farm. It did not appear that either Heaton or Henry M. ever relied upon the security named in the notes, themselves, or pursued that personal property, but it did appear that the property was lost sight of, and nobody knows what became of it, or when it was lost sight of. The masters think the evidence warrants the presumption that John at some time disposed of it.

The circumstances surrounding the parties at and about the

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date of the Randall note suggested to the mind of the masters some doubt as to whether Henry M. preserved that note as a subsisting debt against Polly and John. The evidence presents to the minds of the masters the conjecture that that note was given at the time Henry M. purchased the Peck decree, with a view, then entertained, but afterwards abandoned, that new notes should be given for all that Henry M. should pay out to redeem the farm, Polly and John still retaining an equitable interest in the property.

The other facts are sufficiently stated in the opinion of the court.

*S. C. Shurtleff*, for Cummings.

The question raised on the report is naturally divided into two parts: (1) How much mental capacity must a person possess to make a valid pledge of such person's property for the payment of debts? (2) How much mental capacity must a person possess, who at the time is without present means, to make a valid pledge of an expectancy, to enable such person to live without becoming a public charge?

It is found in this case that Polly Gould knew what she signed, and that it bound her expectancy to pay the debts named in the contract; and realized and knew the difference between one sum of money and another. The only infirmity found by the masters is lack of memory.

If Polly Gould understood what she was doing, and the effect of the act, as the masters have found in this case in reference to the assignment, of what consequence is it whether she understood other things reasonably or unreasonably?

Different men come to different conclusions upon the same state of facts, as to what is reasonable or unreasonable; that is, they differ in judgment. This is not a valid excuse for not performing a contract understandingly made.

The issue in this case is the same as in *Allore v. Jewell*, 94 U. S. 506 (24 L. ed. 260), in which the court uses the following language in stating the issue: "The question presented

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for determination is whether the deceased at the time she executed the conveyance in question, possessed sufficient intelligence to understand fully the nature and effect of the transaction; and, if so, whether the conveyance was executed under such circumstances as that it ought to be upheld, or as would justify the interference of equity for its cancellation."

The same doctrine is laid down in the case of *Harding v. Handy*, 24 U. S. 11 Wheat. 103 (6 L. ed. 429).

Imbecility or weakness of mind, not amounting to idiocy or lunacy, is not alone sufficient to avoid a deed. *Jackson v. King*, 4 Cow. 207; *Smith v. Beatty*, 2 Ired. Eq. 456.

Unless there is inadequacy of consideration, or some other evidence of fraud, imposition, or over-reaching, any degree of imbecility or insanity short of total business incapacity, will not suffice to avoid a contract. *Henderson v. McGregor*, 30 Wis. 78; *Darnell v. Rowland*, 30 Ind. 342; *Henry v. Ritenour*, 31 Ind. 136; *Hall v. Perkins*, 3 Wend. 626; *Odell v. Buck*, 21 Wend. 142; *Petrie v. Shoemaker*, 24 Wend. 85; *Person v. Warren*, 14 Barb. 488; *Hirsch v. Trainer*, 3 Abb. N. C. 274; *Clearwater v. Kimler*, 43 Ill. 272; *Sheldon v. Harding*, Id. 74; *Farnam v. Brooks*, 9 Pick. 212; *Beller v. Jones*, 22 Ark. 92; *Mann v. Betterly*, 21 Vt. 326.

The report finds that A. O. Cummings acted in good faith in this matter, so that there was no over-reaching or anything to put a prudent man on inquiry.

Absolute soundness of mind is not necessary to enable one to make a valid conveyance. It is sufficient if the mind comprehend fully the import of the particular act. *Rippy v. Gant*, 4 Ired. Eq. 443; *Miller v. Craig*, 36 Ill. 109; *Dennett v. Dennett*, 44 N. H. 531; *Hovey v. Hobson*, 55 Me. 256; *Speers v. Sewell*, 4 Bush, 239; *Creagh v. Blood*, 2 Jones & La. T. 509; *S. C.* 8 Ir. Eq. 434.

*Senter & Kemp* and *Pitkin & Huse*, for Davis.

As to the measure of her capacity, the rule is that she must have had enough to enable her to understand and comprehend

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in a reasonable manner the nature and effect of the business which she was doing, as stated in *Stewart v. Flint*, 1 Vt. (L. ed.) 274, 4 New Eng. Rep. 120, 59 Vt. 144; or, as stated in *Hill v. Day*, 34 N. J. Eq. 150, approving *Lozear v. Shields*, 23 N. J. Eq. 509, "Where there is no reason to suspect fraud, the test, where mental incapacity is charged, is: Did the person whose act is challenged possess sufficient mind to understand in a reasonable manner the nature and effect of the act he was doing, or the business he was transacting?"—or, as Lord HALE would have put it, "Did she know what she was about?"

I. The whole case shows Polly's condition at the time of the assignment to have been one of great and real mental weakness, and, "in a case of real mental weakness, a presumption arises against the validity of the transaction; and the burden of proof rests upon the party claiming the benefit of the conveyance or contract, to show its perfect fairness and the capacity of the other party." 2 Pom. Eq. Jurisp. s. 947; *Baker v. Monk*, 33 Beav. 419; *Wartemberg v. Spiegel*, 31 Mich. 400; Bigelow, Fr. 282; Kerr, Fr. 189, 190; Bailey, Onus Probandi, 353.

II. But if the statement quoted from Mr. Pomeroy is, without some element added thereto, too broad in any respect, the facts of this case supply the necessary additional element. It may be said, and certainly nothing more can be said, that, in addition to real mental weakness—which is all that Mr. Pomeroy names—there must be substantial inadequacy of consideration, or undue influence, or certain fiduciary relations between the parties. With any one of these three elements added, Mr. Pomeroy's statement cannot be considered too broad.

Among the relations named above as fiduciary, which include all those where there is influence on one side and confidence on the other, are those of parent and child, guardian and ward, attorney and client; as well as others of a class yet open, regarding which it was said by Lord CHELMSFORD in

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*Tate v. Williamson*, L. R. 2 Ch. App. Cas. 55, quoted in 2 Pom. Eq. Jurisp. s. 956: "The jurisdiction exercised by courts of equity over the dealings of persons standing in certain fiduciary relations has always been regarded as one of the most salutary description. The principles applicable to the more familiar relations of this character have been long settled by many well-known decisions, but the courts have always been careful not to fetter this useful jurisdiction by defining the exact limits of its exercise."

Mr. Pomeroy says, in the above section: "We are now to view fiduciary relations under an entirely different aspect; there is no intentional concealment, no misrepresentation, no actual fraud. The doctrine to be examined arises from the very conception and existence of a fiduciary relation. While equity does not deny the possibility of valid transactions between the two parties, yet, because every fiduciary relation implies a condition of superiority held by one of the parties over the other, in every transaction between them by which the superior party obtains a possible benefit, equity raises a presumption against its validity, and casts upon that party the burden of proving affirmatively its compliance with equitable requisites, and of thereby overcoming the presumption." It should be noted that the application of this principle is made purely upon the fact of the fiduciary relation, and, indeed, Mr. Pomeroy says that where this relation exists the existence of "mental weakness, old age, ignorance, pecuniary embarrassment, and the like" is "incidental, not necessary;" but we suggest that, where they exist to the extent shown in this case, they form a very important "incident."

III. The report finds "Polly was induced to execute the assignment by John. Cummings' negotiations were mostly with John, and John influenced his mother." We claim that this, with what is elsewhere found in the report, may be taken to be a finding of undue influence by John, with the effect of which Cummings was chargeable.

The following cases show that even imputed undue influence

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would put this burden on Cummings; much more is it put on him by the direct findings: 3 Lead. Cas. Eq. 123; 27 Moak, Eng. Rep. 417, note; 32 Moak, Eng. Rep. 321, note; *Huguenin v. Baseley*, 14 Ves. Jr. 273; *Maitland v. Irving*, 15 Sim. 437; *Maitland v. Backhouse*, 16 Sim. 58; *Espey v. Lake*, 10 Hare, 261; *Archer v. Hudson*, 7 Beav. 551; *Cooke v. Lamotte*, 15 Beav. 234; *Hoghton v. Hoghton*, Id. 278; *Blackie v. Clark*, Id. 595; *Cobbett v. Brock*, 20 Beav. 524; *Berdoe v. Dawson*, 34 Beav. 603; *Baker v. Bradley*, 7 De G. M. & G. 597; *Lyon v. Home*, L. R. 6 Eq. 655; *Kempson v. Ashbee*, L. R. 10 Ch. App. Cas. 15; *Bainbrigge v. Browne*, L. R. 18 Ch. D. 188; *Ross v. Ross*, 6 Hun, 80; *Leighton v. Orr*, 44 Iowa, 679; *Noble v. Moses*, 1 So. Rep. 217.

IV. But the burden is without question on Cummings, for the assignment was of an expectancy: One claiming under conveyance of an expectancy must show affirmatively its perfect fairness, and that a full and adequate consideration was paid. This Cummings has not done. 2 Pom. Eq. Jurisp. 953; 1 Story, Eq. Jurisp. 336; Bigelow, Fr. 274; *Bromley v. Smith*, 26 Beav. 664; Chitty, Eq. Index V. 3, 2794; Hill, Tr. 238; Adams, Eq. 5th Am. ed. 372; Bailey, Onus Probandi, 352.

The opinion of the court was delivered by

Ross, J. The contention is between the interpleading defendants, — Davis, as the representative of Polly Gould's estate, and Cummings, as the representative of Henry M. Cummings' estate,—and is, whether Polly Gould, December 13, 1881, possessed sufficient mental capacity to make binding the transaction then entered into by her with the defendant, A. O. Cummings. She was then nearly ninety years old, and her mental faculties much enfeebled and obscured. The measure of capacity required to make a binding contract was recently before this court sitting in full bench at the last General Term, in *Stewart v. Flint*, 59 Vt. 144. It is there held that the party must possess capacity enough to enable her



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to understand and comprehend the nature and effect of the business she was doing. The masters have found that on the day of executing the assignment of her expectancy in her sister's estate "Polly's memory of recent events was seriously impaired, though better touching occurrences of her earlier years, as is said to be often the case with old people."

"She was laboring under the impression that she was going to get the whole of the Lucinda Cutler estate, amounting to about \$17,000, when the ten years expired; and although Mr. Cummings, in the interview when said assignment was executed, told her that she would not, that the children of the brothers and sisters would share in it, she still persisted in the belief that she would get the whole of it, and Mr. Cummings could not make her see otherwise. The inducement held out to her for executing the assignment was that she could remain on the farm, and her desire to do so with John, as her companion, was the consideration in her mind that obscured all others. She understood that the signing of those papers obligated her to the payment of the indebtedness named therein, and pledged her interest in her sister's estate for such payment. She could distinguish in her mind the difference between one sum of money and another; but she had not sufficient memory and mental vigor to understand, in a reasonable manner, whether she owed the debts named in the assignment, or whether, in justice and equity, she ought to pay them."

The statement of her capacity in this quotation from the report is not in substance changed nor varied by the other statements in the masters' report. While she understood the effect of the transaction in which she was engaged, did she understand and comprehend its nature? We think she did not. She did not comprehend, and, in her then condition, could not, whether she owed the debts she was binding herself to pay, nor whether they were of such a nature that in justice and equity she ought to bind herself to pay them. In other words, she had not sufficient mental capacity to distinguish her own debts from the debts of others, nor to discriminate

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whether they were of such a character that they equitably and justly belonged to her to pay, or had a moral claim on her for payment. She was without determining capacity in herself, and the judgment which she once possessed was gone. She did not, and could not be made to understand her rights in her sister's estate; and her desire to be with her son John as her companion was a consideration in her mind that obscured all others, and that was the inducement held out to her for executing the assignment. This last indicated that undue influence was taken of her desire to be with John as her companion and partake of "the warm drink" which he furnished. Whether this undue influence was exerted by Mr. Cummings or John is left in doubt by the report of the master. But by which exerted, it controlled her rather than a reasonable comprehension of the nature of the transaction—of the property she possessed, even in prospect, and of its application or assignment for the payment of her own debts or of the debts of others, which had some just and equitable claims upon her for payment—in executing the assignment. The assignment must therefore be set aside. Whether the estate of Henry M. Cummings has a valid claim against her estate for the use of the farm from December, 1881, to April, 1884, notwithstanding her incapacity to enter into a valid contract, is not presented for consideration, and no opinion is expressed in regard thereto.

The decree of the Court of Chancery is affirmed and the cause remanded.

## Insurance Co. v. Wright.

LYCOMING FIRE INSURANCE CO. v. MEDAD  
WRIGHT & SON.\*

*Fire Insurance. Foreign Insurance Company. Evidence.  
Presumption. Laws of Another State, how proved.  
Act of 1874, No. 1, ss. 1, 2 ; R. L. ss. 3610, 3618.*

1. Parol evidence was admissible to prove that a license had been issued by the secretary of state to a foreign insurance company to do insurance business, when the loss of the license was shown, and there was no law requiring it, or the fact that it had been issued, to be recorded.
2. It is presumed that a foreign insurance company duly filed in the office of the secretary of state a copy of its by-laws, when it was proved that the secretary had issued to the company a license to make insurance contracts, and the statute provided that no license should be issued, until such copy had been filed; as it must be presumed, until the contrary is shown, that the secretary of state did his duty, and would not have issued the license unless the company had complied with the law.
3. In the Act of 1874, No. 1, s. 2, which prohibited a foreign insurance company from taking insurance in this State unless it was "responsible by the laws of the state" in which the company was situated for the acts and neglects of its agents, the word "laws" includes not only the statutory, but the common law of that state.†

\* Heard May Term, 1887.

† Act of 1874, No. 1, ss. 2, 9 (Rev. Laws, ss. 3610, 3618). Sec. 2. All fire insurance companies, other than those chartered by the General Assembly of this State, are prohibited from taking insurance in this State, unless such company or companies shall be responsible by the laws of the State in which such company or companies are situated, or by the Act incorporating such company or companies, or by a proviso to that effect inserted in their policies of insurance, for the acts and neglect of their agents as between said companies and the assured, and, as between said companies and the applicants for insurance therein.

Sec. 9. It shall not be lawful for any (foreign) insurance company embraced in sec. 7 to transact any insurance business in this State, unless such company shall first obtain license of the insurance commissioners, authorizing the company so to do. Before receiving such license, the company shall file with the secretary of state a certified copy of its charter and by-laws, and a full statement, under oath, of its president and secretary, showing the financial condition and standing of the company, in accordance with blanks furnished by him.

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4. In an action by a Pennsylvania insurance company to recover an assessment, one question was, whether the company, under the laws of that state, was responsible for the acts and neglects of its agents, and the court below found from testimony, as matter of fact, that the law of that state was as reported in certain cases in its Supreme Court Reports, which were referred to as part of the exceptions, and rendered judgment for the plaintiff. The cases showed that the company was liable for the neglects of its agents, which under our statute, enabled it to do business here. *Held*, that there was no error.

SPECIAL ASSUMPSIT to recover three assessments upon premium notes. Plea, general issue. Trial by court, March Term, 1887, VEAZEY, J., presiding. Judgment *pro forma* for the plaintiff to recover the amount of said assessment, with interest from date, provided in the charter and by-laws for interest to be paid. Affirmed.

The policy was issued to the defendants October 30, 1875, and ran five years. The plaintiff was admitted to do business in this State in 1870, and a license was issued to it for that purpose, and continued to do business here till 1880.

The exceptions stated that: "The licenses issued to this company were lost. \* \* \* A license was issued to the plaintiff company by the insurance commissioners of Vermont, to do business in this State for the year 1875, and for every subsequent year until 1880. This fact was found upon parol evidence, the licenses being lost," etc.

The court found, that the plaintiff had complied with the statute as to filing papers with the secretary of state or the insurance commissioners, in order to be entitled to a license to issue policies of insurance in this State, but was unable to find, from the evidence produced, that the by-laws of the company had ever been filed with the secretary of state. The policy was made "subject to the Act of incorporation and by-laws of the said company, which are to be used and resorted to to explain or ascertain the rights of the parties hereto in all cases not herein otherwise provided."

A question was made, whether, under the laws of Pennsylvania, where plaintiff company was located, an insurance company of that state was liable for the acts and neglects of its agents, as between the company and the insured. It was

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conceded, that there was no statute law of Pennsylvania to that effect, but it was claimed that under the decisions of the highest court of that state an insurance company was so liable at the common law. An officer of the company but not a lawyer, who had charge of the litigation of the plaintiff in that state, and had for many years made it a part of his business to keep himself familiar with the decisions of that court upon said question, and who testified that he knew what the decisions were in that respect, was allowed, against defendant's objections to testify as an expert as to the law of Pennsylvania upon the point in question. And he testified that the decisions had been in accordance with the plaintiff's claim, and that the plaintiff company had been so held liable; and referred to the cases, and produced the volumes of Pennsylvania Reports in which he claimed such had been the rulings, and adopted the same as his testimony as to the law of that state on this question.

The defendants improved Mr. Ashton R. Willard, a practicing member of the Vermont bar, as a witness, upon the same question; and he testified that he had examined the decisions as reported in the Supreme Court Reports of that state, and that they did not hold as stated by the other witness. He produced decisions, some of which were the same as referred to by the plaintiff's witness. The exceptions stated: "As both these witnesses fall back upon the reported decisions of the Pennsylvania courts, as a basis of, and adopt the same as their testimony, as to the law of that state upon the point in question, this court found that the law is as held and reported in the Supreme Court Reports of Pennsylvania." [Here was the following amendment inserted upon the suggestion of the Supreme Court: "In volumes 4, p. 185; 23, p. 72; 51, p. 462; 75, p. 378; 24, p. 320; 100, p. 347; 83, p. 223; 8, p. 464; 50, p. 331; and in 7 W. & S. p. 348; which are referred to as a part hereof."]

Further facts are stated in the opinion of the court.

*Senter & Kemp*, for the defendants.

There can be no recovery, because the plaintiff had not complied with the laws of this State when the premium notes were executed. The court below failed to find that the company had ever filed a copy of its by-laws with the secretary of state, as required by sec. 9, No. 1, of the Laws of 1874, which was a condition precedent to its right to receive the license.

Section 7 of the same Act prohibits all insurance companies not organized under the laws of this State from transacting business in this State "until all the laws relating to insurance companies in other states, enacted by this State, shall have been complied with."

These conditions constitute a part of the law, and insurance companies cannot qualify themselves to transact such business without compliance with them. 55 Vt. 526.

The insurance policy issued to these defendants refers specifically to and makes the by-laws a part of the contract; these by-laws contain many prohibitions on the assured, and it was very essential that the assured have access to them in case of loss, as they contain the instructions and rules for procedure for the assured in such an event. As this company had not complied with the requirements in regard to filing its by-laws, the insurance contract made by it in this case was prohibited by law, and the premium notes were void. *Aetna Ins. Co. v. Harvey*, 11 Wis. 394; *Williams v. Cheney*, 8 Gray, 206; *Haverhill Ins. Co. v. Prescott*, 42 N. H. 547; *Williams v. Cheney*, 3 Gray, 215; *General Mut. Ins. Co. v. Phillips*, 13 Gray, 90; *Cincinnati Mut. Health Assur. v. Roseenthal*, 55 Ill. 85; *Lamb v. Lamb*, 6 Biss. 420.

The words "laws of the state" as used in the Act of 1874, mean the positive written statute law of the State. *Swift v. Tyson*, 41 U. S. 16 Pet. 18 (10 L. ed. 871). See also *Bouv. L. Dict.* 11, 12; *Burr. L. Dict.* 11, 32; *Abb. L. Dict.* 11, 13; *Gelpcke v. Dubuque*, 68 U. S. 1 Wall. 175 (17 L. ed. 520); *Delmas v. Merchants Mut. Ins. Co.* 81 U. S. 14 Wall. 661 (20 L. ed. 757); *Boyce v. Tabb*, 85 U. S. 18 Wall. 546 (21 L. ed. 757).

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Agents of insurance companies in Pennsylvania are not responsible to the degree that the Act in question called for.

Agents of a mutual insurance company cannot prejudice the rights of the company by misrepresentations as to the places where risks were located,—as that the company does not take risks in the cities. *May, Ins. s. 133; Hackney v. Alleghany County Mut. Ins. Co. 4 Pa. 185.* The local agent has no authority to receive notice of loss, and is not bound to communicate it to the company. *Edwards v. Lycoming County Mut. Ins. Co. 76 Pa. 378; Smith v. Ins. Co. 24 Pa. 320.* An agent of an insurance company whose duty it is to take surveys, to receive applications for insurance, examine the circumstances of losses, approve assignments and collect assessments, is not authorized to accept notice of over insurance or waive its consequences. *Mitchell v. Lycoming Mut. Ins. Co. 51 Pa. 402.* See *May, Ins. s. 145; New York Union Mut. Ins. Co. v. Johnson, 23 Pa. 72; Susquehanna Ins. Co. v. Perrine, 7 Watts & S. 348.*

*Charles W. Porter*, for the plaintiff.

At the time this contract was executed, the company was licensed by the insurance commissioners to transact business in this State and it is to be presumed that the insurance commissioners had required a compliance with all the provisions of the statute which they, as agents of the State, considered material or necessary to the protection of the public.

The intent of the legislature seems to have been in passing the act of 1874, to declare what financial condition was requisite to enable a foreign insurance company to do business here; and to enable the courts to get jurisdiction over them. *Sawyer v. North American L. Ins. Co. 46 Vt. 706.*

A failure to comply with a statute of a state does not avoid promise to pay premiums to a foreign company. *Clark v. Middleton, 19 Mo. 53.* Whether a statute prohibiting an act renders a contract made in contemplation of the act void depends on whether, in view of the whole statute, the makers

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meant that the contract should be void in the sense that it could not be enforced. *Harris v. Runnel*, 53 U. S. 12 How. 79 (13 L. ed. 901); *Pangborn v. Westlake*, 36 Iowa, 546; *Union Gold Min. Co. v. Rocky Mt. Nat. Bank*, 96 U. S. 641 (24 L. ed. 650); *Union Nat. Bank v. Matthews*, 98 U. S. 621 (25 L. ed. 188); *Morawetz, Corp. ss.* 661-666.

It was expressly declared that a contract entered into in contravention of this statute should be valid. Gen. Stat. chap. 87, s. 13. And if the contract is valid, the note given as a consideration for it must be valid. *Lester v. Webb*, 5 Allen, 573; *Hartford L. S. Ins. Co. v. Matthews*, 102 Mass. 224.

Although our statutes since 1850 have declared that our home companies should be held responsible for the acts and neglects of agents, our courts have repeatedly defined the limitations of authority of insurance agents. *Farmers Mut. F. Ins. Co. v. Marshall*, 20 Vt. 27; *Carrigan v. Lycoming F. Ins. Co.* 53 Vt. 418.

Under the decisions of the courts of Pennsylvania, made prior to this contract, an insurance company is liable for the acts and neglects of its agents. *Lycoming F. Ins. Co. v. Woodworth*, 83 Pa. St. 223; *Eilenberger v. Protective Mut. F. Ins. Co.* 89 Pa. St. 464; *Columbia Ins. Co. v. Cooper*, 50 Pa. St. 331.

The requirement of the Act of 1874, No. 1, s. 9, that each company shall file with the secretary of state a certified copy of its by-laws, is merely directory.

Members of a mutual insurance company are presumed to know the terms of the charter and the by-laws of the company, and are bound by them. *Mitchell v. Lycoming Mut. Ins. Co.* 51 Pa. 402; May, Ins. s. 542 and cases cited.

Whether a statute is mandatory or directory depends upon whether the things prohibited or directed to be done are of the very essence of the thing required. *Rex v. Lozdale*, 1 Burr. 447; 81 Pa. St. 349.

But when the particular provisions of a statute relate to



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some immaterial matter, where compliance is a matter of convenience rather than substance, they are regarded as directory. 19 Barb. 558; 4 Neb. 336; *Crosby v. School Dist. No. 9*, 35 Vt. 625.

The opinion of the court was delivered by

TAFT, J. Before an insurance company located in a sister state can make a valid contract of insurance in this State, it must obtain from the secretary of state a license for that purpose, and it must be responsible by the laws of the state in which it is situated, or by its act of incorporation, or by contract in its policies, for the acts and neglects of its agents, as between the company and the assured and applicants for insurance. R. L. ss. 3610, 3618; 55 Vt. 526. Before receiving such license the company must file with the secretary of state a certified copy of its charter and by-laws, and a statement of its financial condition. R. L. s. 3610. Three questions are presented by the brief for the defendants.

I. Was parol evidence admissible to show the issuing of the license to the plaintiff. The loss of the license was shown. There was no law requiring a license to be recorded, or requiring the fact that one had been issued to be recorded; it was therefore competent to show the fact by parol.

II. The court found upon trial that a license had been issued to the plaintiff, and that prior thereto a copy of its charter with its financial statement was properly filed, but was unable to find that a copy of the by-laws had been filed with the secretary of state. It was obligatory upon the plaintiff before it was entitled to a license to file a copy of its by-laws. The license was issued. What the effect would be in case the fact was found that no copy of the by-laws was filed, we are not called upon to decide. It does not appear but that a copy was filed, and in the absence of all showing that it was not, we think the case calls for the application of the rule that acts which purport to have been done by public officers in their official capacity, and within the scope of their duty, will be

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presumed to have been regular and in accordance with their authority. He who alleges that an officer intrusted with an important duty has violated his instructions must show it. 2 Best on Evidence, Morgan's ed. 622, note 1; *Ross v. Read*, 1 Wheat. 482; *Delassus v. The United States*, 9 Pet. 117; *R. R. Co. v. Stimpson*, 14 Pet. 448. In *Waddington v. Roberts*, L. R. 3 Q. B. 579, an action to recover under a deed of composition, a question arose under the Bankruptcy Act 24 and 25 Vict. chap. 134. The deed under that act could not be lawfully registered unless accompanied by a prescribed affidavit. The objection was made that no proof was given that the affidavit which the statute required was filed; but the court said it would "be presumed until the contrary was shown that a public officer acting in execution of a public trust would do his duty, and therefore that the registrar would not have registered the deed unless it was accompanied by the necessary affidavit;" and see *Grindell v. Brendon*, 6 C. B. N. S. 698. In Missouri a foreign insurance company is prohibited from carrying on business until it has filed with the insurance commissioner a certificate stipulating that service may be made upon him; and where it is alleged in the petition that a foreign company is doing business in the state, it will be *presumed* that it has complied with the law; *Knapp v. Ins. Co.* U. S. Cir. Ct. E. D. Missouri, BREWER, J., 16 Ins. Law Journal, 798, Sept. 1887. It has been held in this State that a public officer, acting under the provisions of a statute, is presumed to have performed his duty until the contrary appears. *U. S. Bank v. Tucker*, 7 Vt. 134; *Chandler v. Spear*, 22 Vt. 388. To sustain this objection would require us to presume that the secretary of state was guilty of a gross violation of his duty. In the absence of all showing the presumption is that he did his duty, and that prior to issuing the license the by-laws had been filed in his office.

III. Was the plaintiff responsible by the laws of Pennsylvania, between it and the assured and applicants for insurance, for the acts and neglects of its agents? What the law of the

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state was, was a question of fact for the County Court to pass upon. It did so by finding that the law was as reported in certain cases in the Supreme Court Reports of that state, which are referred to as a part of the exceptions. The cases show that the plaintiff was liable for their agents' acts and neglects, between it and persons doing business with it. In *Columbia Ins. Co. v. Cooper*, 50 Pa. St. 331, the court say, in speaking of the relations between the company and its agent, that if the assured "has been guilty of no misrepresentation, concealment or fraud, the company had better pay his loss than to attempt to make him responsible for the blunders of their own agent." In *Lycoming Fire Ins. Co. v. Woodworth*, 83 Pa. St. 223, the main point relied upon by the company to defeat the action was that the agent was not authorized to make the representations which induced the execution of the premium note; and the court held that the company was bound by the representations of its agent in the act of making the contract. It is insisted that this liability must be one created by statute. Although the words "laws of a state" are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, as stated by STORY, J., in *Swift v. Tyson*, 16 Pet. 1, 18, we think in the present instance that such could not have been the intent of the legislature, nor the meaning of the statute. The act prohibiting the contract unless the company was responsible, by the laws of the state where it was located, for the acts and neglects of its agents, was originally passed as No. 47, 1850, and applied as well to domestic as foreign companies. It is declaratory of the common law, which made a principal responsible for the acts and neglects of his agents within the scope of his authority. It is argued that the statute means more than the common law; for if not, why pass it? Its object undoubtedly was to prevent companies from attempting to abrogate the common law by inserting a clause in their policies or by-laws that an agent, taking an application for insurance, should be deemed the agent of the assured and not of the company. This practice,

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which was common at that time, was the evil to be remedied, and it mattered little to the assured whether the liability of the company was created by statute or whether it was a common law obligation resting upon it; in either case the rights of the assured were protected in that respect.

Judgment affirmed.

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ANDREW E. DENNY, EX'R, v. HEIRS OF HARRIET PINNEY.\*

*Will, Publication of. Evidence, Rebutting. Practice. Deposition.*

1. It is a sufficient publication of a will where the testatrix and the witnesses severally signed it in the presence of each other, although the testatrix did not personally say that it was her will, but the person who drew it for her announced to the witnesses in her presence that it was, and requested them to sign it as witnesses.
2. When one of three attesting witnesses to a will has deceased, and another was present in court and testified to the signing, it was not incumbent on the proponent to produce the other, who resided in another state and not within reach of process, nor, to take his deposition, though he was in this State for a few days during the pendency of the cause.
3. In an action to establish a will the contestant pleaded mental incapacity and undue influence, and the proponent introduced evidence, in the opening, bearing on both points, to prove capacity; the contestant put in evidence to show that the testatrix was weak in body and mind to sustain his plea of undue influence, and the proponent offered in rebuttal evidence relating to the health and activity of the testatrix and her ability to labor; *Held*, that, the burden being on the proponent to prove the capacity of the testatrix but on the contestant to prove undue influence, the evidence, though cumulative as to one issue, was rebutting as to the other, and admissible.

APPEAL from the probate of the will of Harriet Pinney.

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\* Heard May Term, 1887.

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Trial by jury, September Term, 1886, POWERS, J., presiding. Verdict sustaining the will. Affirmed.

The will purported to be signed by the said Harriet Pinney and witnessed by F. W. Bartlett, Abbie C. Howes, and Willie F. Baker. It was conceded that said Baker had deceased; and it appeared that said Bartlett, at the time of the trial, was residing in the State of New York, but that, since the cause had been pending, he had been in Northfield for several days, where the testatrix lived the last fifteen years of her life, and where the principal legatee resided; and that the proponent's attorney saw him about taking his deposition, but Bartlett finally went away, and no deposition was taken. The proponent produced in court the said Abbie C. Howes, who testified to the signing of the will by said Harriet Pinney and by herself and by the other two witnesses, all in the presence of each other. The court ruled that the will was established, and it was admitted in evidence.

The proponent in the opening of the case put in evidence as to the state of body and mind of the said Harriet Pinney before, at the time of, and after the execution of the will. After the contestants had closed their evidence, Mrs. Ellen Alvord, the principal legatee, was recalled in rebuttal, and asked the following:

Q. "You have heard what was said about her state of health, activity and labor; tell in short or generally how that was during the last year of her life."

Mr. Shurtleff: "We raise the question that the proponent, having gone into the state of body and mind at the time the will was made, has put in his testimony, and cannot go into it in the close."

The court: "We understand this matter of varying the rules to be a matter of discretion, but we will rule as a matter of law so that you can have an exception."

The answer was admitted, which was favorable to the proponent, to which the defendant excepted.

The other facts are sufficiently stated in the opinion.

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*Frank Plumley* and *S. C. Shurtleff*, for the contestants.

It was the duty of the proponent to produce and examine all the attesting witnesses. *Thornton v. Thornton*, 39 Vt. 122.

There was no publication of the will. It has been held (*Dean v. Dean*, 27 Vt. 746) that no formal publication was necessary; but some act of the testatrix signifying that she meant to give effect to the paper as her will, was necessary. Here she did not write the will, nor in any way, herself, acknowledge the same to be her will to the witnesses, nor request them to sign it; and so far as they knew, the testatrix had no knowledge of its contents. 2 Greenl. Ev. ss. 675, 677, and notes; Schoul. Wills, 182, 2-7; *Chandler v. Ferris*, 1 Har. (Del.) 454.

The burden of proof was on the proponent both as to the execution of the will and the capacity of the testatrix. *Roberts v. Welch*, 46 Vt. 164; *Williams v. Robinson*, 42 Vt. 658.

The proponent went fully, in the opening, into the question of the testatrix's capacity, and, under rule 23, is confined to evidence legitimate to rebut that given by the defence. Our practice is that of the common law, "and the plaintiff's reply is limited to new points, first opened by defendant." 1 Greenl. Ev. p. 469; *Parker v. Hardy*, 24 Pick. 246; *Rawlings v. Chandler*, 9 Exch. 687.

*James N. Johnson* and *Heath & Willard*, for the proponents.

There was no error in admitting the will, as proved, to go to the jury. Bartlett, the subscribing witness, was out of jurisdiction of our courts, and, under the circumstances, need not be produced in court. *Carrington v. Payne*, 5 Ves. Jr. 404, 411; *Bernett v. Taylor*, 9 Ves. Jr. 381; *Bootle v. Blundell*, 19 Ves. Jr. 501; R. L. s. 2056; *Dean v. Dean*, 27 Vt. 746; *Thornton v. Thornton*, 39 Vt. 122.

The publication of the will was sufficient. The statute does not require a declaration of the testatrix. R. L. s. 2042; *Blanchard v. Blanchard*, 32 Vt. 62; *Roberts v. Welch*,

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46 Vt. 164; *Dewey v. Dewey*, 1 Met. 349. See Schoul. Wills, s. 329.

The testimony of Mrs. Alvord was rebutting as to the evidence presented by the contestant under his plea setting up undue influence. *Williams v. Robinson*, 42 Vt. 658; *State v. Magoon*, 50 Vt. 339.

The opinion of the court was delivered by

Ross, J. I. The testatrix and the attesting witnesses severally signed the will in the presence of each other. The testatrix did not personally say it was her will. Mr. Baker, who drew the will for her, in her presence announced to the witnesses that it was her will and requested them to sign it as witnesses. This was a sufficient publication of the will, and gave the witnesses full knowledge of the act they were performing. The act of the testatrix, in signing the alleged will, in the presence of the witnesses after they had been informed by Mr. Baker that it was her will, and requested to sign it as such, as well as her silence, after the proclamation by Mr. Baker, was an affirmance, by the testatrix, and an acquiescence in the announcement by Mr. Baker. It was all the publication required, as it fully informed the witnesses, with the testatrix's implied assent and approval, of the nature of the act they were asked to perform. *Roberts v. Welsh*, 46 Vt. 164; *Dean v. Dean*, 27 Vt. 746.

II. It was not incumbent upon the proponent to produce the attesting witness Bartlett in court. He was beyond reach of process. The English practice adopted by this court requires the proponent only to proceed and examine such of the attesting witnesses as are within reach of process. *Thornton v. Thornton*, 39 Vt. 122. He must be within reach of process, and legally obtainable at the trial. It was no more the legal duty of the proponent to procure the deposition of such a witness, who resided beyond the reach of process, than it was the duty of the contestants; nor was it any more his duty to produce the deposition of such a witness, because he had an

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opportunity to take his deposition when the witness happened to be in the State, than if the witness remained all the time without the State, provided the proponent knew his residence. In neither case could he produce the witness upon the trial, and examine him. The practice here and in England, has never required the production of the deposition of such a witness. To make such a deposition of value the instrument proposed must be produced to the witness identified. It would be difficult and objectionable to do this. The proposed instrument is required to be deposited with the Probate Court, and, for proof before that court, is not within the control of the proponent without an order of the court, even if it is after the allowance of an appeal to the County Court. Besides, more or less danger attends the removal of a proposed will from the State for such a purpose. There was no error in the action of the County Court in regard to the production of the deposition of this witness.

III. Was the testimony of Mrs. Ellen Alvord rebutting, when recalled after the contestants had closed their testimony? The contestants by their pleas raised two issues,—incapacity and undue influence. As to the first, the burden of proof was on the proponent. *Williams, ex'r, v. Robinson*, 42 Vt. 658. When the due execution of the will, and testamentary capacity of the testatrix, were proved, the law presumed, she intended that the legal results of her act should follow. Hence on the issue in regard to undue influence the contestants went forward. On the issue in regard to the mental capacity of the testatrix, the state of the health of the testatrix, her activity and ability to labor, bear indirectly. Hence the proponent introduced evidence bearing upon these points in his opening. Just what he showed the exceptions do not state. But this class of testimony bore also quite as directly upon the issue as to undue influence, in regard to which the contestants took the laboring oar. From the question excepted to, put to Mrs. Alvord, it is apparent that the contestants had gone into this class of testimony on the issue in regard to undue influence ;



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for, the question only called the witness' attention to the testimony on these points introduced by the contestants. The testimony called for by the question would be in rebuttal to the contestant's evidence on the issue in regard to undue influence. It would also bear cumulatively upon the issue made in the opening by the proponent in regard to the capacity of the testatrix. Hence, in one view it was strictly in rebuttal, and in another cumulative, dependent upon the issue to which it applied. It was therefore legally admissible in rebuttal on the issue in regard to undue influence. It could not be made inadmissible because from the nature of the issues it bore indirectly, and was cumulative upon the issue as to the capacity of testatrix. To hold otherwise would be a too strict and narrow construction of this rule requiring each party to put in his full case on the issues resting upon him, and would often make the rule intended for the furtherance of justice, work surprise and injustice. The admission of such testimony, in a case where the issues are thus made, cannot be said to be an infraction of the rule, in letter, or in spirit.

The judgment of the County Court is affirmed, and ordered to be certified to the Probate Court.

## ALLEN BATES v. GEORGE W. BASSETT.

*Municipal Corporation. Towns. Taxation. R. L. s. 2751.*

1. A town by force of the statute,—R. L. s. 2751,—which provides that a town may vote money for necessary incidental town expenses, may legally build a town house, and impose taxation therefor, for the accommodation of its meetings, for its municipal offices, and furnish the building with improved conveniences,—as heat by steam, and water; and if the primary purpose of the erection was for proper municipal uses, the town may rent a part of it for income. And it rests in the discretion of the voters, if exercised in good faith, to decide as to the expense of such building; and in so doing they may anticipate the prospective needs of the town.
2. It is the duty of a town to act with the discretion of a prudent owner in the care and management of its buildings; thus it may lawfully repair an old building for rental purposes, although it would be illegal, if the primary object was to invest money in a building to rent.

REPLEVIN for one cow, etc., taken by the defendant by virtue of his warrant as constable and collector of taxes. Plea, that the property was taken by defendant, as collector of taxes on a rate bill and warrant. Heard by the court, March Term, 1887, TAFT, J., presiding. Judgment for the defendant.

It appeared that the town of Barre owned an old town hall in the second story of a building, the lower story of which was owned by another party; that in the winter of 1885, from the accumulation of snow on the roof, the town hall building was crushed in, completely destroying the walls of that part of the second story belonging to the town; that the selectmen, under a vote of the town, repaired the hall by putting up walls dividing the hall by partitions, into several rooms, and rented them. The court found: That the old town hall was not and is not needed or used for any purposes of the town, and that the same was not necessary or incidental to any use of the town; that the said old town hall was refitted and repaired by the said

town of Barre at an expense of over \$2,500, for the purpose of renting the same; -that the same apartments are now rented to various parties for a term of years by written leases and the town of Barre receives and takes the rent for the same. We find that it would have been as profitable for the town in the end to have sold their interest in the old town hall instead of repairing and renting it; that in regard to the new town hall that the building could have been built for all the suitable and reasonable uses of the town without being built in the manner and purposes set forth in the statement referred to. It is at the present time a profitable investment; we cannot find whether it will so continue or not. We think a town hall suitable and proper for the town could have been built without building any part or portion of it for rental purposes, and as profitable for the town; that the money expended in repairing the old town hall together with the building of the new town hall and the fitting up of the same with scenery, heating apparatus, and both together went in to make up a portion of the indebtedness of said town of Barre for the payment of which a tax was levied against the plaintiff and his property distrained, and was included in the tax so assessed against the plaintiff.

The court also found, among other things, that the facts in the following statement, signed by the defendant, were true: That said building so erected by said committee is built of solid brick walls, is two stories high, with basement underneath the whole of said building; that said basement is divided into five apartments or rooms. In one of them is the apparatus for heating the whole building, and the other four are rented to several parties for a term of years. And none of them are required or used by the town. And while one of them might be used as a storage room for the road machine, spile driver and other town property, it is found that the same can be housed elsewhere at one-fourth of the rental value of one of said rooms. That the first story of said building was divided into four apartments or rooms. The first is used as a post-

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office, and a small room finished off in the rear of said office is occupied by the town and village clerk and treasurer, and contains the safe and records of the town, and said room is small, not over twenty feet square, and of little value with the rental of said town, and the fair rental of the town will not exceed \$50 per year. The annual rental of the first story and basement is about \$1,300. The second story of the building is finished off for a town hall, or, as it is generally known, the "Opera Hall." The hall was built and finished off for a town hall and an "opera hall." Several dressing rooms and closets were fitted for the accommodation of theatrical troops.

"It is agreed that the old site is centrally located and easily accessible, and that it could have been rebuilt and furnished at an expense to the town of not exceeding \$5,000, so that the same would have been as safe and as convenient to the voters of said town assembled in freeman's and town meeting for the transaction of the business of the town as is the new hall, but would not be as convenient, desirable or valuable to rent for theatrical, operatic or other purposes."

The new building cost over \$29,000. The selectmen purchased scenery for the stage in the hall at an expense of \$413.50, and whole expense of fitting up the stage was \$850. The population of Barre is rapidly increasing. The town was obligated to a third party to keep the walls of the second story and the roof of the building in which the old hall was situated, in good repair.

*John G. Wing*, for the plaintiff.

A municipal corporation can lay no taxes unless the power be plainly and unmistakably conferred. 2 Dill. Mun. Corp. s. 763; 4 Wait, Act. & Def. 621; *Caldwell v. Rupert*, 10 Bush. (Ky.) 179; *Kniper v. Louisville*, 7 Bush. (Ky.) 599; *In re M. E. Church*, 66 N. Y. 395; *Sewall v. St. Paul*, 20 Minn. 511; *Vance v. Little Rock*, 30 Ark. 430; *Heine v. Levee Comm'rs*, 19 Wall. 660; *Daily v. Swope*, 47 Miss. 367; *Waterhouse v. Board, etc.*, 8 Heisk. 857; *Wheatley v.*

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*Covington*, 11 Bush. (Ky.) 18. And then only for a public purpose. *Allen v. Jay*, 60 Me. 124; *Loan Association v. Topeka*, 20 Wall. 664; *McCulloch v. Maryland*, 4 Wheat. \*431; *Broadhead v. Milwaukee*, 19 Wis. 658; *Weismer v. Douglas*, 4 Hun, 201; *Matter of Market Street*, 49 Cal. 546; *Cooley*, Con. Lim. 479; *Mayor v. New York*, 11 Johns. 80; *Camden v. Allen*, 2 Dutcher, 398; *Hanson v. Vernon*, 27 Iowa, 28.

If the defendant can justify under the vote of the town, it can be only under section 2751, Rev. Laws.

If any of the items furnished by the town were not "necessary incidental expenses," the whole tax was void. *Drew v. Davis*, 10 Vt. 506; *Bangs v. Snow*, 1 Mass. 181; *Stetson v. Kempton*, 13 Mass. 272; *Libby v. Burnham*, 15 Mass. 272; *Johnson v. Colburn*, 36 Vt. 693.

Municipal corporations have power to fit up a building for municipal purposes. *People v. Harris*, 4 Cal. 9; 4 Wait, Act. & Def. p. 214. A city cannot erect buildings for business purposes. *Worden v. New Bedford*, 131 Mass. 23; *Oliver v. Worcester*, 102 Mass. 489; *Hill v. Boston*, 122 Mass. 344; *French v. Quincy*, 3 Allen, 9. Nor purchase land to stop litigation. *Place v. Providence*, 12 R. I. 1. As bearing upon this question, see *Hazen v. Strong*, 2 Vt. 427; *Briggs v. Whipple*, 6 Vt. 95; *Drew v. Davis*, 10 Vt. 56; *Van Sicklen v. Burlington*, 27 Vt. 70. The case of *Beatty v. Knowler*, 4 Pet. 163, will tend to explain and limit "incidental expenses." *Hood v. Lynn*, 1 Allen, 103; *Vincent v. Nantucket*, 12 Cush. 103; *Lyman v. Newton*, 134 Mass. 476.

The town had no right to repair the old hall. The new town hall was not built in good faith for municipal purposes, but for an opera hall, stores, etc.

*E. W. Bisbee* and *S. C. Shurtleff*, for the defendant.

Towns are authorized by statute to provide a suitable place for holding the meetings, and for other purposes incidentally

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connected with the business of the town. R. L. s. 2751. The building of the town hall comes clearly within section 2751, Rev. Laws. *Van Sicklen v. Burlington*, 27 Vt. 70; *Dill. Mun. Corp.* ss. 91, 463. The population of Barre is rapidly increasing, and it had a right, and it was its duty, to provide for its prospective wants. *Greenbanks v. Boutwell*, 43 Vt. 207; *French v. Quincy*, 3 Allen, 9; *Spaulding v. Lowell*, 23 Pick. 71, 80; *Williard v. Northampton*, 12 Pick. 230; *Stephens v. Kent*, 26 Vt. 511; *Hill v. Boston*, 122 Mass. 344; *Worden v. New Bedford*, 131 Mass. 23; *Bell v. Plattville*, 36 N. W. Rep. 831; *Reynolds v. Mayor of Albany*, 8 Barb. 597; *Greeley v. People*, 60 Ill. 20; *Eddy v. Wilson*, 43 Vt. 362.

It was for the town to judge whether to repair the old hall or build a new one. The facts show that the town acted in good faith.

The opinion of the court was delivered by

POWERS, J. It is undeniably true that towns have no power in the absence of special statutory authority to levy taxes upon their inhabitants. It is undeniably true that under such statutory authority they are limited to taxation for municipal or public purposes. It is undeniably true that in the care, preservation and management of their property, whether it consist of buildings, tools, road-machines or anything else, they not only have the clear right, but in justice to the taxpayers, are in duty bound to act with the discretion of a prudent and provident owner.

Towns have the clear right to build town houses for the accommodation of its meetings and rooms for its municipal offices. Expenditures for such purposes are proper incidental expenses within the range of section 2751, Rev. Laws.

In this case the town was confronted with a calamity which compelled a choice between building a new town house or repairing the old one. It might lawfully do either. It elected to build a new one. The building of the new one was an ob-

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ject of a public character which made taxation for the purpose lawful. Having the power to impose taxation for the new building, the town in legal meeting is the only umpire to decide how much it will expend in such building. We do not say that the discretion of the majority of the voters is unlimited in respect to a proposed expenditure for a proper municipal purpose. Cases may be easily conceived where a majority might vote an excessive tax from a reckless disregard of all rules of prudence. But courts do not undertake to set up their own views of the propriety of municipal actions as the standard by which to try the action of a town in the exercise of a power lodged with it by the law, but leaves the exercise of such power just where the legislature has left it, in the discretion of the voters until it is seen that the discretion is abused by a willful perversion of the power to illegal ends or abuse of its exercise that demands restriction.

The town of Barre might well anticipate its prospective needs in providing itself with a new town hall. It was not tied down to the iron rule of absolute necessity in determining the kind or style of its town hall. But it might build fitly according to its ability and according to its manifest destiny. It might provide such conveniences and improvements as prudent people customarily employ in the day and generation in which it builds. If steam heating is thought superior to the old-fashioned fire-place, if the introduction of water into the building conduces to health as well as cleanliness, both manifestly are proper furnishings to the new building. The fitting up of rooms for rent was an expense *incidental* to the building of the town hall. The town has no right as a primary purpose to erect buildings to rent, but if in erection of its hall for its proper municipal uses, it conceives that it will lighten its burdens to rent part of its building whereby an income is gained, no sound reason is suggested why it may not do so. The true distinction drawn in the authorities is this: If the primary object of a public expenditure is to subserve a public municipal purpose the expenditure is legal, notwith-

standing it also involves as an incident an expense which standing alone would not be lawful. But if the primary object is not to subserve a public municipal purpose but to promote some private end, the expenditure is illegal, even though it may incidently serve some public purpose. This is the test where good faith is exercised in making the expenditure. If a public purpose is set up as a mere pretext to conceal a private purpose, of course the expenditure is illegal and fraudulent. There is nothing in this case that invalidates the action of the town in building its new town hall. *Spaulding v. Lowell*, 23 Pick. 71.

Having elected to build, the town had on its hands an old building. In the exercise of what seemed to them to be a wise discretion, the voters decided to repair it for rental purposes. This is said to be illegal. It would be, if the primary object was to invest money in a building to rent. The town could not purchase a building for rental purposes solely. But here the town already owns a building purchased or erected for its proper municipal purposes. It no longer has use for it for municipal purposes. Must it sacrifice its property, or may it not do with it what a prudent man would do with such a building? Suppose in a few years its road machine is supplanted by some improved machine which it deems it is wise to purchase, could it not keep its old one in repair to rent advantageously to others? It is no answer to say that the town would in the long run be as well off to give away its old building. The question was one for the town to decide for itself and its decision made in good faith is final.

The numerous cases cited in the defendant's brief fully support the conclusions here reached.

Judgment affirmed.



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Lucia v. Eaton.

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J. H. LUCIA, ON BEHALF OF HIMSELF AND ALL  
TAXPAYERS OF THE VILLAGE OF MONTPE-  
LIER, v. THE VILLAGE OF MONTPELIER,  
THE BOARD OF BAILIFFS, THE BOARD  
OF WATER COMMISSIONERS, AND  
F. L. EATON, TREASURER.

[IN CHANCERY.]

*Municipal Corporation. Village.*

1. When the legislature delegates to an incorporated village power, without limitation, to supply itself with water for fire and domestic uses, such power rests in the discretion of the voters of the village in respect to the amount of money to be expended on aqueducts and the supply of water, if exercised in good faith and for a proper municipal purpose.
2. And in such case, when a village has constructed one water main, it was held to be a question of expediency for the voters to decide whether another should be built; and an injunction was refused restraining the expenditure of money voted for that purpose, although the water in the existing main was used to some extent in running motors, and afforded a fair supply of water, if no accident befell it, and although some of the voters were influenced by a desire for an increase of motive power, but the concrete vote was given for the purpose of rendering the water supply more useful and certain.

BILL IN CHANCERY. Heard on the pleadings and testimony, March Term, 1888, ROWELL, Chancellor. The court *pro forma* and without hearing decreed that the defendants be perpetually enjoined from laying the water main mentioned in the bill, and that said Eaton be perpetually enjoined from hiring any money on the credit of the said village for the purpose of paying the expenses of the same.

The bill set forth, among other things :

“ That heretofore, to wit, in the year 1855, the legislature

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of the State of Vermont incorporated the village of Montpelier; that the act of incorporation is numbered 89 of the Session Laws of 1855; that at the biennial session of the legislature of the State of Vermont in 1872, said act of incorporation was amended by an act numbered 257.

“ That section one of this last-named act is as follows: ‘ Section 1st, The second section of the act of incorporation of the village of Montpelier is hereby so amended as to authorize said corporation to purchase the right to take water from the outlet of Berlin Pond or such other place as said corporation may desire, and convey said water in suitable aqueducts and pipes to said village, and then distribute the same through said village in aqueducts and pipes for the extinguishment of fires and sanitary purposes, and for the use and convenience of the inhabitants of said village, and receive and collect such rents for the use of water as shall be agreed upon by the parties.’

“ That section six of the act last named is as follows: ‘ Section 6th. Said village is hereby authorized to issue bonds to an amount not exceeding \$50,000 on such terms as such village shall prescribe for carrying into effect the foregoing provisions.’

“ That although said corporation is authorized by section one of its original charter to lay a tax on the polls and ratable estate of said village for the purpose mentioned in said charter, yet said corporation is not empowered to borrow money in any way except by said section six, hereinbefore set forth; that the village of Montpelier was duly organized and has acted as a corporation for more than twenty years last past; that in the year 1884, the village of Montpelier purchased the right to take water from the outlet of Berlin Pond, and either purchased or otherwise procured the right to construct a reservoir and aqueduct to convey the water to the village of Montpelier.

“ That the reservoir was constructed on the brook flowing out of Berlin Pond about two miles distant from said village, and a large iron pipe laid to conduct the water from said reservoir to said village, and the water is conducted in iron pipes of different sizes through said village for the extinguishment of fires, sanitary purposes and all the ordinary uses for which water is used.

“ That said aqueduct and reservoir are well and permanently built, and of ample size, so that sufficient water will flow through the same for the extinguishment of fires, sanitary and

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domestic purposes at all times, and is in every way suitable for the wants of the inhabitants of said village, and large enough for the prospective needs of said village, and will afford sufficient water for all the purposes contemplated in said charter, when said village shall contain six times its present number of inhabitants.

“ That the village of Montpelier issued its bonds and sold the same in the market in the sum of \$50,000, as authorized by its charter, to aid in constructing said aqueduct, which bonds are now outstanding, and that sum not being sufficient to complete the same, raised by tax about the sum of \$15,000, which has been expended in and about completing the same.

“ That at the time of the making of the plans and of the construction of said aqueduct it was not contemplated by those having the direction of construction and estimates that the water brought in said aqueducts could be used for power, and the estimates did not contemplate such use, but after its construction, there being a large surplus of water, supplied by said aqueduct, not wanted for public use, or used for other purposes, it was found that by reason of the great height of the reservoir above the village that such surplus water could be used in running motors, and a large number have been put in of various sizes by the inhabitants of said village, and such power has been rented for a sum much less than such power could be obtained in any other way.

“ That at the biennial session of the legislature of the State of Vermont, in the year 1884, an act was passed amending the charter of the village, and said act is numbered 212 of the Session Laws of 1884.

“ That there being more persons living in the village of Montpelier who desire water for power at low rates, and others wishing to induce people to engage in business in Montpelier, propose to furnish them power by laying another aqueduct or main from said reservoir to the village of Montpelier; and accordingly a meeting of the voters of said village was called on the 26th day of September, A. D. 1887, at which time certain votes were passed under article one in said warning, which were as follows :

“ 1st. To see if the village will vote to lay another main water pipe from the reservoir, so-called, in Berlin, to some convenient point in said village, and to provide ways and means to defray expenses of the same.’

“ At the meeting aforesaid the following votes were passed,

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viz.: 'Moved by A. J. Sibley, that the village shall vote to lay another main water pipe from the reservoir in Berlin to some convenient point in said village, which motion was carried by a rising vote, 159 yeas, 12 nays.'

"On motion of C. H. Heath, the proper officers were directed to carry out the vote taken under article one of the warning.

"On motion of F. L. Eaton, the treasurer was authorized to borrow a sum not exceeding \$30,000 to defray the expense of laying the pipe as provided in article one of the warning.

"That the sole purpose of putting in said second main from the reservoir to the village of Montpelier, is to provide power for individuals or corporations, and the water to be conveyed in the same is not needed for public use or purposes; that the village of Montpelier has no means of paying the proposed expense of the additional water main except by taxation."

The prayer was for a temporary injunction restraining the defendants "from entering into any contract with any person or persons for pipe to lay the main water pipe mentioned in the foregoing bill of complaint, and from incurring any expense on behalf of the village of Montpelier toward constructing a main water pipe from the reservoir to the village of Montpelier as provided in the vote of said village, on the 26th day of September, A. D. 1887, and that the said F. L. Eaton, treasurer of the village of Montpelier, be restrained from borrowing any money on the credit of said village for the purpose set forth in said vote of September 26th, 1887, until the further order of the court, and that on hearing, said injunction be made perpetual." The other facts appear in the opinion.

*Senter & Kemp and Pitkin & Huse*, for the defendants.

The village of Montpelier, under its charter, section 2, has a right to provide a water supply for its inhabitants (33 Vt. 277), though it could not without authority granted by the legislature exercise the right of eminent domain. *Rome v. Cabot*, 28 Ga. 40; *Livingstone v. Pippin*, 31 Ala. 542; *Dill. Mun. Corp.* s. 371.

The village, in its vote of September 26th, 1887, to lay an-

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other main water pipe from the reservoir in Berlin to some convenient point in the village, was in the exercise of a proper municipal function of which it was the proper and sole judge. The record of that vote is the only proper proof of what it was. *Britt v. Cabot*, 36 Vt. 349. The vote of September 26th, 1887, was a legislative act on the part of the village. *Railroad v. City of New York*, 1 Hilton, 562, 588. And as to the legislative acts and discretion of the higher legislative bodies, the motives and the intent of individual legislators are not subject matter for judicial inquiry. "The acts of a state are subject to still less inquiry, either as to the act itself or as to the reason for it." *Doyle v. Continental Ins. Co.* 94 U. S. 533, 541; *Kountze v. Omaha*, 5 Dillon, 443; *Wright v. Defrees*, 8 Ind. 298, 302; *Goddin v. Crump*, 8 Leigh, 120, 156; *Railroad Co. v. Cooper*, 33 Pa. St. 386; *Johnson v. Higgins*, 3 Mot. (Ky.) 476; *People v. Draper*, 15 N. Y. 555; Cooley on Con. Lim. 222; 2 Dill. Mun. Corp. s. 601.

And as to municipal action and discretion the same rule prevails, and their action is conclusive when the subject matter is within the delegated legislative powers. 1 Dill. Mun. Corp. s. 94; *Livingstone v. Pippin*, 31 Ala. 542; *Spalding v. Lowell*, 23 Pick. 71-80; *Hovey v. Mayo*, 43 Me. 322, 334; *R. R. Co. v. New York*, 1 Hilton, 562, 588; *Des Moines Gas Co. v. Des Moines*, 44 Iowa, 505; *Meth. E. Church v. Baltimore*, 6 Gill, 391, 400; *Williams v. School District*, 33 Vt. 271; *Eddy v. Wilson*, 43 Vt. 362.

It is not for the court to dictate to the village how it shall spend its money, unless the authority of the representatives of the citizens has been exceeded. *Torrent v. Muskegon*, 47 Mich. 115. No principle of law is more solidly established than that when, in the honest and legitimate pursuit of a lawful object, a municipality obtains a water supply, it need not let the excess thereof run to waste, but may put it to profitable use. *State v. Eau Claire*, 40 Wis. 533; *Canal Co. v. Water Power Co.* 35 N. W. R. 529, 534, cited in *Bell v. Plattville*, 63 N. W. R. 831.

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*S. C. Shurtleff*, for the orators.

It is for the court to determine upon the evidence whether any given enterprise is a public or private undertaking, so as to authorize a corporation to engage in it by taxing its citizens. *Tyler v. Beacher*, 44 Vt. 148.

The village is not the sole judge of the amount of water requisite for public purposes. If this proposition is as claimed by the defendants, then, if there is one public purpose named, the village is unlimited in the amount and number of pipes or aqueducts it may lay or the amount it may expend and tax its inhabitants for, though in fact very little is used or needed for public purposes, and under cover of one lawful expenditure, any number of private enterprises may be carried on. Can things be thus done indirectly which cannot be done directly?

The reasonable rule seems to be that in this case, the village was authorized to take all the water needed for public purposes, and in this outlay it had a right and it was its duty to take into consideration the prospective needs of the village; that is, make such an aqueduct as would supply the present and prospective needs of the village amply, for all public purposes and when the aqueduct was built, all the water not presently needed for public purposes can be used for other purposes until such time as it should be needed for public purposes. It might as well be said that a man should provide himself with two houses instead of one; or that a town should build two bridges, because it might happen that one would be carried off.

This is not the exercise of that *honest discretion* in doing what the village had a right to do, as is mentioned by the court in *Greenbanks v. Boutwell*, 43 Vt. 207; but it comes clearly within what the court say in that case would be a pretext of a lawful purpose to do what it had no legal right to do.

Villages and towns have no right to incur debts, or levy taxes to aid or encourage private or corporation enterprises for manufacturing or mining. The leading case on this subject is

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*Citizens' Savings & Loan Association v. Topeka*, 20 Wall. 655.

The cases are there all collected on this subject up to that time.

This question has twice been before the Supreme Court of the United States, and the same principle re-affirmed. *Parkersburg v. Brown*, 106 U. S. 500; *Cole v. La Grange*, 113 U. S. 6; *Tyler v. Beacher*, 44 Vt. 648.

The opinion of the court was delivered by

POWERS, J. This is a bill in equity brought by sundry taxpayers in the village of Montpelier to arrest the expenditure of municipal funds for a proposed extension of the water supply of said village.

The facts established by the evidence, are, briefly stated, as follows: Prior to September 26, 1887, the village of Montpelier had at great expense and by virtue of its chartered authority, secured the right to take water from Berlin Pond to supply the wants of its inhabitants for domestic and public purposes. The supply thus secured largely exceeded the present wants of the village, and the excess owned by the village was running to waste. The main pipe conducting the water to the village crosses the Winooski river and is exposed to damage, if not breakage, by the breaking up of the ice and floating of floodwood in the spring of the year. The water has been used to some extent as a power in running motors in the village, from which use a considerable revenue has been earned.

The village is very compactly built, and a large fire threatens more damage to property than it would were the buildings more isolated or scattered. The water supply, however, is sufficient for ordinary fire exposure.

The voters of the village, at a legal meeting held on the 26th day of September, 1887, voted by a large majority to lay another water main from the village reservoir in Berlin to the village and authorized a loan of \$30,000 to defray the expense.

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The bill in this case seeks to restrain this expenditure, the orators insisting that the additional main is not wanted for any proper municipal purpose within the chartered power of the village, but primarily to supply additional power to run machinery, and the defendants insisting that the primary purpose is to render the supply of water more secure in case of injury to the original main, and more ample in case of an extraordinary fire. The defendants furthermore insist that inasmuch as the village owns an excess of water beyond the capacity of its reservoir, it has the right to use the same for manufacturing purposes even if it subserves no proper municipal end beyond the earning of income for the village. In support of the last proposition the defendants cite the cases of *State v. Eau Claire*, 40 Wis. 533; *Canal Co. v. Water Power Co.* 35 N. W. R. 529; and *Bell v. Plattville*, 36 N. W. R. 831.

We have no occasion to consider the soundness of this last claim of the defendants, as we are all agreed that the evidence warrants the expenditure on grounds clearly within the chartered power of the village.

The legislature delegated to the village the *power* to supply itself with water for fire and domestic uses. It left the exercise of this power to the discretion of the voters. It fixed no limits to the expenditure and set no bounds to the supply. It presented no system and devised no plan for adoption. It left the entire legislative function involved to the judgment of the village. The village, for aught that appears, in good faith in the exercise of its power, adjudges that its fire exposure demands a water supply that is beyond all danger, so far as possible, of failure, both under ordinary and extraordinary contingencies, and that its supply for ordinary domestic uses shall not be cut off by any failure in the original main.

It is very clear upon the authorities that a purpose to forefend against possible dangers to its water supply is both a dictate of prudence and of duty. The question whether it be wise to incur the expense proposed does not address itself to



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the court. We have only to consider the question of power. The legislature left the question of expediency to the village, not to us. The *power* existing, the manner and extent of its exercise as determined by its custodian, must be held legal, until it is seen that it is perverted to wrongful ends or diverted to wrongful uses. The fact that while a proper municipal purpose is answered by laying an additional main, an incidental improper purpose is subserved, does not invalidate the action of the village, provided, in good faith, the primary purpose of the expenditure is to perfect its water supply generally, and the additional motive power gained, is a mere sequence of its action.

Suppose the village had deemed it wise at the outset to lay two mains instead of one in order to secure an uninterrupted flow of water in case either failed, would it be seriously claimed that it had exceeded its chartered power? If such action were warrantable then, it is warrantable now. The power was not exhausted in the first attempt at its exercise. The power given the village was to take water from Berlin Pond for municipal uses. If by the growth of the village the first draft upon the supply becomes inadequate for its legitimate wants, may it not be enlarged?

If the first method of supply, though ample, is exposed to hazards, that threatens its continuance, it is quite clear that it may be perfected by any means that will secure the end for which the power was given.

That the original main afforded a fair supply, if no accident befell it, we can easily see; and that some individual voters desired quite as much, at the meeting of September 26th, to obtain an increase of motive power, as a more certain water supply for ordinary municipal purposes, we can well believe; still we are satisfied from the facts shown that the concrete vote of that meeting had its foundation in a purpose and desire to make the water supply of the village for all uses to which it might be subjected under the charter, more ample, more useful and more certain.

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This being so, it is a question of judgment upon a proposed municipal expense for a legitimate purpose which under the law addresses itself to the voters of the village and not to the courts. 1 Dill. Mun. Corp. s. 94; *Spaulding v. Lowell*, 23 Pick. 71; *R. R. Co. v. New York*, 1 Hilton, 562; *Bates v. Bassett*, ante, p. 530.

The decree is reversed and the cause remanded to the Court of Chancery with a mandate to dismiss the bill with costs.

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A. N. TILDEN v. JOHN CRIMMINS AND WIFE.

*Assignee. Deed. Homestead.*

1. The homestead of an insolvent debtor passes to his assignee on the assignment of his estate by the court, when such homestead is liable to be taken on execution in payment of debts contracted before the homestead was acquired; and in such case the assignee's deed may convey the homestead to one who has purchased the premises of him.
2. And an assignee's deed, which contained these words, "*subject to the mortgagor's homestead right*," was construed to mean such right as he had against the order of assignment; and it was held, that, if the deed did not convey the homestead, it still remained vested in the assignee for the payment of such debts.

BILL to foreclose a mortgage and the defendants' interest in real estate of which they held a bond for a deed. Heard on the pleadings and a master's report, April Term, 1888, ROWELL, Chancellor.

It was decreed that the defendants have no homestead interest in the premises described in the orator's bill; that the said Catharine Crimmins has no right of redemption in said premises; that the orator is the owner in fee of said premises, and is entitled to the possession of the whole of the premises described in the orator's bill; that the defendants be per-

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petually enjoined from interfering with the orator in taking possession of the whole of said premises; and that the orator have a writ of possession.

It appeared that one Rich, in November, 1866, conveyed certain premises to the defendant, John Crimmins, and a mortgage was given back to secure the purchase money; that Rich sold the mortgage to one White, and that the same came into the possession of Clark King, the executor of White; that King foreclosed, and obtained a decree at the March Term, 1880, which was to be paid on or before April 1, 1881; that King and Crimmins entered into an arrangement in December, 1883, by which he gave Crimmins a written contract, called a bond for a deed, and Crimmins gave King his note for \$560.70; that in June, 1886, there was due on the note \$515.34, and King conveyed his right in the same to the orator.

It further appeared that in April, 1876, one Margaret Marr conveyed to the defendant, John Crimmins, a farm of one hundred and ten acres, which adjoins the said premises purchased of said Rich, and the two farms have been used and occupied by Crimmins as one farm; that both defendants executed a mortgage of the premises to secure the purchase money—\$1,500; that in June, 1886, said Marr sold and assigned said mortgage to the orator, and the same amounted to \$872.49.

The orator had a long account against John Crimmins which was nearly all for goods out of the orator's store, and delivered to the defendant and used in the support of the defendants and their family. The account began January, 1872, and was closed in 1879. This account, together with some notes that defendant had given the orator, was sued by the orator, and went into a final judgment for the sum of \$744.65 at the September Term, 1885, and the cost was allowed at \$22.87. An execution was duly issued on the judgment. The case was entered in court at the September Term, 1884, and both farms were attached on said writ. The orator proved his judgment against Crimmins in the court of insolvency.

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The defendant, John Crimmins, on his own petition, went into insolvency. The date of the petition did not appear, but such proceedings were had that on the first day of March, 1886, he was adjudged an insolvent debtor by the court of insolvency for the District of Washington, and H. G. Ellis was appointed the assignee. Ellis, as assignee, sold to the orator on the 22d day of May, 1886, both of said farms "subject to the mortgagor's homestead right and all other encumbrances as appear by deed," for the sum of \$2, and conveyed the same by deed dated the third day of June, 1886.

It was found that the value of the farm above both mortgages was \$111.97 in June, 1886. The prayer was that the equity of redemption which the defendants had under said mortgage and contract be foreclosed; that a writ of possession be awarded, and that an injunction be granted, etc.

*James N. Johnson* and *George W. Wing*, for the defendants.

The defendants have a right to redeem the farms from the purchase money mortgages. The assignee's deed does not defeat that right. It cannot affect Mrs. Crimmins, who was not a party to the insolvency proceedings. If the right to redeem does not exist, then by the report the homestead right is limited to \$111.97, and this sum should be decreed to be paid by the orator. The defendants are not liable to contribute to the payment of any part of the mortgages; because the orator took his deed subject to all the homestead rights. He abandoned his levy of execution and proved his judgment. The orator took no steps in accordance with the statute—R. L. s. 1803—to perfect his attachment lien. He proved his judgment as an unsecured creditor. The debt dates from the date of the judgment. The same principle will apply to the homestead act as was applied to the act of imprisonment in 1839. If any part of the judgment accrued after the act took effect, no imprisonment could be had on the execution. *Witt v. Marsh*, 14 Vt. 303.

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The real estate then was relieved from the attachment and was left unencumbered except by the mortgages, and when the orator paid these, they were extinguished, so far as the homestead is concerned. If wrong in this position, then the wife has a right to redeem. The orator bought subject to the homestead right and mortgages. When he is paid his mortgages, he can ask nothing more, except the \$2 paid for his deed. The homestead act is to receive a liberal construction. 38 Vt. 18; 28 Vt. 674; 36 Vt. 254. The husband, wife and children can bring suit when the husband has deeded away the homestead. 47 Vt. 375. The deed of the assignee has no greater force than that of the husband. *Pierce v. Kusic*, 56 Vt. 418.

*S. C. Shurtleff*, for the orator.

The orator's debt was older than the homestead right of the defendant, and it was liable to attachment. R. L. s. 1901. The assignee took all the rights of an attaching creditor. R. L. ss. 1818, 1820; *Collender Co. v. Marshall*, 57 Vt. 232. Then all the right the orator acquired by attachment passed to the assignee, and from the assignee to the orator by deed. This is just as well, and saves the expense of a set-off or sale of the property on execution. If there had been other debts older than the homestead, it would be the duty of the court to have the homestead sold and the proceeds divided among those entitled to it. As the wife gets her rights, if any, by virtue of her marital relation, it is not apparent how her rights can exceed those from whom she derived the right.

The opinion of the court was delivered by

Ross, J. The only question is whether the defendants, or either of them, have a homestead right or interest in the premises.

The Rich mortgage was given for the purchase money, and bound the entire premises for its payment. No homestead right or interest in the premises existed against this mortgage.

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It was foreclosed at the March Term, 1880, and the decree became absolute April 1, 1881. There is no fact found by the masters which modifies or varies the effect of that decree as having become absolute, in accordance with its terms, April 1, 1881. The defendants thereby lost all homestead rights in the premises which antedated the decree. Crimmins, by taking the contract, called a bond for a deed, in December, 1883, yielded to the force of the decree as absolute. All the defendants' right to a homestead in the premises must date and be derived subsequently to that contract. The debt due the orator all accrued before the date of the contract. The homestead interest of the defendants in the premises was subject to be taken for its payment. R. L. s. 1901. By the order of assignment of the court of insolvency the assignee of John Crimmins took title to all his property "which might have been taken on execution upon a judgment against him at the time of the filing of the petition." R. L. s. 1820; *Collender Co. v. Marshall*, 57 Vt. 232. Therefore, for the payment of the orator's judgment debt, the assignee by the order of assignment took the entire premises, including the defendants' homestead interest. Their homestead interest above the payment of the Rich and Marr mortgages—owned by the orator, and which covered the entire premises, including the homestead interest—was much less than the orator's judgment debt. The orator acquired all the rights of the assignee in the premises by his purchase and deed from him. By the clause, "subject to the mortgagor's homestead right," inserted in the deed from the assignee, must be meant such homestead right as the mortgagor had against the order of assignment of the court of insolvency. But if by this clause the mortgagor's homestead right did not pass to the orator by the assignee's deed, that right passed to the assignee by the order of assignment, and still remains vested in the assignee for the payment of the orator's judgment debt, or some portion thereof. It is not in the defendants, and they cannot set it up against the orator in this proceeding. If the orator has not obtained that interest

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by his deed from the assignee, he is entitled to have the assignee now sell it and turn the avails towards the payment of his judgment debt. On these views—without considering the other questions discussed in the brief of the defendants' solicitor—it follows that the defendants have no homestead right in the premises against the mortgages, judgment debt, and deed from the assignee, now owned by the orator. Mrs. Crimmins has no homestead interest therein greater or other than has her husband. The decree of the Court of Chancery is affirmed, and cause remanded.

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## JAMES W. BROCK v. JOHN W. CLARK.

*Sale. Deceit.*

When one sells hay for *good hay*, and its quality cannot be ascertained by ordinary examination because the hay was baled, if it is defective, he is liable for the difference between the value of the hay as it was and as it was represented; and the price for which the vendee sells the hay has no relation to the rights of the parties, except as to the value of the hay.

ACTION for deceit in sale of hay. Heard on a referee's report, March Term, 1888, ROWELL, J., presiding. Judgment for the plaintiff for \$36.40,—the sum allowed by referee with interest. It appeared that the hay was raised on the defendant's land, was pressed and baled by his servants, and that he never saw the hay; that plaintiff bought the hay relying on the representations; and that the hay was damaged \$26.98 in value. As to the sale of the hay by the plaintiff, the referee found as follows: The hay was shipped to one Bruce, and the plaintiff charged him \$20 per ton, which was \$6 per ton more than the plaintiff paid the defendant. "Bruce made

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no question about the price of the hay at that time nor did he ever object to paying full price for the hay as charged by plaintiff on account of its being damaged. Plaintiff and Bruce had dealings together, and had a large unsettled account. Subsequently, when plaintiff and Bruce came to settle up their account, Bruce having then learned that plaintiff paid only \$14 per ton for this hay, he objected to paying plaintiff \$20 per ton, claiming that plaintiff had no right to charge him more than he paid; that he was to have the hay at whatever plaintiff paid for it, and was to pay plaintiff a reasonable sum for his trouble in buying it for him; plaintiff did not admit that his contract with Bruce was such that he had no right to charge him a profit on the hay; but the charge for hay was compromised between them at \$117.94. This was in a general compromise of their whole account, other items of which were in dispute. Bruce yielded certain claims in consideration of this compromise. Plaintiff paid the freight on the hay to Roxbury, amounting to \$11.20, making the cost of it at that place \$119.14; \$1.20 more than plaintiff was allowed for it in the compromise."

*C. H. Pitkin and C. M. Bennett*, for the defendant.

No fraud being shown, the plaintiff can recover no more damages than he has sustained. *Baldwin v. Porter*, 12 Conn. 484; *Hurlburt v. Green*, 41 Vt. 490; *Hogan v. Thorington*, 8 Port. 428; *Reggio v. Braggiotti*, 7 Cush. 169; Sedgw. Dam. p. 29.

The measure of damages on a breach of warranty is governed by substantially the same rules as in the case of a vendor's breach of his obligation to deliver. *Benj. Sales*,—1159; *The Camden Consolidation Oil Co. v. Schlen & Co.* 59 Md. 31-44; *Woodward v. Thatcher*, 21 Vt. 580; *Wing v. Chapman*, 49 Vt. 33; *Hubbard v. Rowell*, 51 Conn. 423; *Murray v. Jenkins*, 42 Conn. 9; Sedgw. Dam. p. 115, note.

Unless both fraud and damage concur an action will not lie. 1 Swift, Dig. 554; 49 L. J. (Con. Law) N. S. 851. The



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plaintiff must show that he has sustained some injury. *Weaver v. Wallace*, 4 Halst. 251.

The report shows that the plaintiff never suffered any damage because of the transaction.

*George W. Wing*, for the plaintiff.

The representations made by the defendant and relied upon by the plaintiff constituted a warranty of the quality. There being a breach of the warranty, the plaintiff is entitled to recover, and no question is made, but the referee has followed the correct rule of damages. 54 Vt. 226; 58 Vt. 543; 49 Vt. 22; 13 Wall. 379; 40 Vt. 588; 3 Cranch, 270.

The opinion of the court was delivered by

Ross, J. It is established by the report of the referee that the hay purchased of the defendant, and paid for by the plaintiff, was to be *good hay*. It was baled and its quality could not be ascertained by ordinary examination. It did not answer to the character of *good hay*. The plaintiff was entitled to the benefit of the contract, whether he made a profit or suffered a loss in its sale. As the hay received, because of its damaged condition, did not fulfil the terms of the contract, the plaintiff was entitled to recover from the defendant such a sum of money as, added to the value of the hay received, would make the whole equal to the value of *good hay*.

The judgment of the County Court was for this sum and no more. The defendant made no compensation for the deficient quality of the hay by the sale to Bruce. He was not a party nor privy to that sale, nor affected by it beneficially, nor adversely. That sale, except as evidence of the value of the hay received, had no relation to the contract rights existing between the plaintiff and defendant in regard to the hay.

The judgment of the County Court is affirmed.

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Eddy v. Kinney.

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## JOHN E. EDDY v. L. T. KINNEY AND ANOTHER.

*Fence. R. L. s. 3184. Contributory Negligence.*

Under the statute,—R. L. s. 3184,—one is not guilty of contributory negligence in turning his cattle into his pasture although he has knowledge that the division fence of an adjoining landowner is insufficient, and that if his cattle should escape into such owner's field they would be liable to injury; and in an action to recover for injuries to the plaintiff's cattle, evidence is not admissible in behalf of the defendant to prove such knowledge.

ACTION on the case for negligence. Trial by jury, September Term, 1887, TAFT, J., presiding. Verdict for the plaintiff.

The parties were adjoining landowners of occupied lands in Marshfield, Vt. The Montpelier & Wells River Railroad crossed said lands. The lands of the parties were separated by a fence, which was legally divided. There was a fence between the plaintiff's land and the railroad track, but none between the track and the defendants' land. The part of the fence between the parties' lands which the defendants were bound to keep in repair was insufficient. By reason of such insufficiency the plaintiff's cattle escaped from his pasture over the defendants' fence into the latter's pasture, and from thence strayed on to the railroad track and were killed. The loss from such killing is sought to be recovered in this action.

*Heath & Fay*, for the defendants.

It was the duty of the plaintiff, if he knew of the insufficiency of the fence, to have given the notice provided for by section 3184, Rev. Laws, and build the fence, and in failing to do so, it was negligence.

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In Massachusetts, under a statute very similar to ours, it has been held negligence to turn cattle into a pasture insufficiently fenced, even though it be the duty of another to fence it, if the want of fence be known to the one turning them in. Mass. Pub. Statutes, chap. 36, ss. 1-4; *Lyon v. Merrick*, 105 Mass. 71.

Contributory negligence is a defence. Shearm. & Redf. Neg. s. 25; Whar. Neg. s. 300; *Burdick v. Worrall*, 4 Barb. 596; *Heil v. Glanding*, 42 Pa. St. 493; *Beatty v. Gilmore*, 16 Pa. St. 463; *Briggs v. Guilford*, 8 Vt. 264; *Trow v. Central R. R. Co.* 24 Vt. 487; 15 Wis. 598; *Saxon v. Bacon*, 31 Vt. 540.

Whether the plaintiff was negligent or not was a question for the jury. *Allen v. Hancock*, 16 Vt. 230; *Willard v. Pinard*, 44 Vt. 34; *Hill v. New Haven*, 37 Vt. 510; *Hyde v. Jamaica*, 27 Vt. 443.

The evidence was admissible to show the plaintiff's knowledge of the insufficiency of the fence.

*J. P. Lamson*, for the plaintiff.

The action is founded on section 3184 of the Revised Laws. The rights of the plaintiff have been fully determined under this statute by this court. *Saxon v. Bacon*, 31 Vt. 540; *Sorenberger v. Houghton*, 40 Vt. 150; *Keenan v. Cavanaugh*, 44 Vt. 268.

The law of contributory negligence does not apply. The plaintiff having complied with the statute owed the defendants no duty. The damage was the direct result of the defendants' negligence.

The opinion of the court was delivered by

Ross, J. The uncontroverted facts, shown by the plaintiff, entitled him to a judgment unless the offered testimony of the defendants was admissible. The parties own adjoining occupied lands, between which the fence was divided. The defendants' portion of the division fence was insufficient and out of repair.

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The plaintiff's cattle escaped from his pasture over the insufficient portion of the defendants' fence and were injured. The defendants offered to show that the plaintiff knew of the insufficiency in the defendants' portion of the division fence, and of the liability of his cattle to be injured if they escaped from his pasture over the insufficient fence, and so was guilty of contributory negligence by turning the cattle into his own pasture. The court rejected the offered testimony, and the rejection is the error complained of. It is provided by section 3184, Rev. Laws: "When a person bound to support a proportion of a division fence does not make or maintain his proportion he shall be liable for damages done to or suffered by the opposite party in consequence of such neglect, and a person who thus sustains damage may, after ten days from the time notice is given to the opposite party, make or put in repair the fence, and recover of the opposite party damages arising from the neglect, with the expense of building or repairing the fence." This section of the law was enacted in 1853. It has been several times before this court for consideration. *Saxton v. Bacon*, 31 Vt. 540; *Sorenberger v. Houghton*, 40 Vt. 150; *Keenan v. Cavanaugh*, 44 Vt. 268.

It has always been treated as determining the rights of the parties. In *Saxton v. Bacon*, *supra*, it was contended that the party injured could only recover in pursuance with the terms of the statute, and upon it; but it was held that he might recover for the injury in a common law action. The contention of the defendant that the party injured must give the notice, and build or repair the fence before he could recover, was denied. It has also been held that it is not necessary for the plaintiff to show that his proportion of the division fence was legally sufficient to entitle him to recover if he showed that his cattle escaped over the insufficient proportion of the fence which the defendant was bound to maintain. *Sorenberger v. Houghton*, 40 Vt. 150. All the cases proceed upon the theory that where the parties have once divided and built the division fence, each, as against the other,

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has the right to assume that the other has claimed to discharge his legal duty in that behalf, and has the right to occupy his own lands. Such occupant is under no duty in regard to the sufficiency of the other's proportion of the division fence. His occupancy of his own land,—although in his judgment the other has not fully discharged his legal duty in maintaining his portion of the division fence,—cannot be said to be strictly contributory negligence. He had the right to occupy his own land. He owed the defendant no duty to refrain from occupying it. He was under no duty to put the defendant's proportion of the fence in legal repair. By the terms of the statute he could not do it until after he had sustained an injury. In the exercise of the right to occupy his own pasture the plaintiff's cattle were placed in a position where they might be injured through the defendant's neglect to discharge his legal duty in maintaining his proportion of the division fence. To hold that such occupancy is negligence, contributing to the escape of the cattle, is a *non sequitur*. As well might it be held that the use of a defective highway by a traveller, however prudently, is negligence contributing to whatever injury he may receive. Such holding would compel every adjoining occupant to judge of and determine the legal sufficiency of the other's proportion of the fence, and if he judged it insufficient, to occupy his own land at his peril. This is counter to the language and spirit of the statute which makes the adjoining proprietor, whose duty it is to maintain a portion of the division fence, liable to the other adjoining proprietor for damages done to or suffered by him in consequence of his neglect to discharge that duty. The spirit and language of the statute, and of the decisions of this court construing it, uphold the decision of the County Court in rejecting the offered testimony.

The judgment is affirmed.

CHITTENDEN COUNTY, JANUARY TERM, 1888.

Present : ROYCE, Ch. J., ROSS, POWERS and TAFT, JJ.

HARRY ROSS, ADM'R OF ROSELPHA SPRAGUE'S  
EST., v. DAVID WHITE.

*Trover. Evidence. Gift. Res Gestæ. Cost.* R. L. s.  
1451.

1. In an action of trover in favor of an administrator, where the defence was a gift by the intestate of the articles in contention, the reason assigned by the defendant for refusing to return them, on demand, namely, that they had been given him, was not admissible as a part of the *res gestæ*; for it was only a narration of a completed transaction.
2. In an action of trover for the conversion of several articles where the plaintiff failed to recover all that he sued for, the defendant is not entitled under the statute,—R. L. s. 1451,—to an apportionment of the costs; as only a single issue was made by the pleadings.
3. But in such case the court below denied the plaintiff costs as to claims which he failed to establish, and the judgment was affirmed.

TROVER. Heard on a referee's report, April Term, 1887, ROWELL, J., presiding. Judgment on the report for the watch ornament, and the finger ring. The court held as matter of law that there could be no apportionment of costs; but as matter of discretion denied the plaintiff costs as to claims that he did not establish. Exceptions by defendant. The action was brought to recover for four notes, sewing machine, table, chair, finger ring, watch ornament, etc.

The defendant claimed title to all the articles as perfected gifts; and that the intestate had given them to him in her lifetime. The other facts appear in the opinion.

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Ross v. White.

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*Hard & Cushman*, for the defendant.

The statement of the defendant as to his title to the watch ornament, that it was a gift, was a part of the *res gestæ*, and was some evidence of his title. Abb. Tr. Ev. 556-7; 1 Green. Ev. ss. 108, 109, 110; 1 Stark. Ev. 39, 47, 48, 49; 1 Phil. Ev. 194, 195; *Davis v. Spooner*, 3 Pick. 284; *Pool v. Bridges*, 4 Id. 377; *Sessions v. Little*, 9 N. H. 371; *Smith v. Young*, 1 Camp. 439; *Bennett v. Burch*, 1 Denio. 141; (Bk. 16, L. ed.) 747; *Gracia v. Robinson*, 14 Ark. 436; *Walrod v. Ball*, 9 Barb. 271; *Lund v. Tyngsboro*, 9 Cush. 36.

The court erred on deciding as matter of law that there could be no apportionment of costs. The statute—R. L. s. 1451—clearly applies to this case.

It is not material to enquire whether there were several issues involved in the present case, although without much straining it might be said that under the general plea of not guilty, an issue was joined upon *each* of the various articles mentioned in the declaration.

The statute does not limit the power to apportion to those cases where several issues are presented by the pleadings but extends the power to all cases where the trial of several and distinct "claims" is involved.

In this case the plaintiff made five distinct claims, each of which stood upon its own peculiar facts and testimony; and upon at least three of those the defendant prevailed, while the plaintiff can succeed on only two, at the most. *Engrem v. Myers*, 54 Vt. 628.

*Roberts & Roberts*, for the plaintiff.

The finding of the referee that the watch ornament was given and delivered to the defendant by the decedent in her life time, rests wholly upon the fact, that the defendant had it in his possession after her death and *claimed* it as a gift. The fact of the claim was thus allowed as proof of the fact claimed, in behalf of the party making the claim; and this upon his own evidence received against objection.

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Such conclusion must rest upon some obscure notion of what is hidden under the term *res gestæ*.

Such declarations are admissible only when made in connection with some act done as explaining or characterizing it, and when they are necessary in order to understand the act. Stephens Ev. 6, 16, 39, 250; Vt. Dig. p. 286; *Dean v. Dean*, 43 Vt. 337.

Though there are several articles sued for, the case did not "involve the trial several and distinct issues," etc. R. L. s. 1451. Here the claim was one and the issue single. *Brainerd v. Casey*, 37 Vt. 479; *Engrem v. Myers*, 54 Vt. 628.

The opinion of the court was delivered by

Ross, J. The defendant insists upon but two questions in this court.

I. That the plaintiff was not entitled to recover for the watch ornament. When the plaintiff demanded the return of the articles in controversy, the defendant stated as a reason for refusing to return this article that the intestate had given it to him in her life time. The referee finds, that, unless the declaration of the defendant is competent evidence of the fact stated, as a part of the *res gestæ*, he cannot find that the defendant owned this article; and that the plaintiff should recover therefor. The action is trover; and the gist of the action is the conversion of the property by the defendant. The demand and refusal were evidence bearing upon the question of the conversion of the articles by the defendant. That was the transaction to which this evidence related. Any declaration of the defendant, made in answer to the demand, qualifying his refusal, was admissible, as a part of the transaction then going forward; to wit, whether the defendant's refusal was conditional or unconditional, and fell short of, as amounted to a conversion of the article. This is clearly shown by the authorities cited by the defendant's counsel; and we entertain no doubt in regard to the soundness of those decisions. But the declaration then made by the defendant, that the article had



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been given him by the intestate in her life time, related to a transaction long before concluded, did not accompany the performance of that transaction, the making of the gift, and was a mere narration of his version of a past, and long since completed transaction. It was clearly inadmissible to show the gift itself. *State v. Carleton*, 48 Vt. 636, and authorities cited on this subject. Doubtless, some confusion has arisen in decisions, in regard to what declarations are admissible as a part of the *res gestæ*, by not always carefully considering and determining the exact transaction done, or performed, which the declaration accompanied, and whether the declaration properly related to, and qualified that transaction, or narrated an account of an antecedent transaction. When the declaration accompanies and qualifies, or characterizes, the transaction then being performed, it is clearly admissible as a part thereof; but so far as it is a narration of a past and completed transaction, it is inadmissible. Hence the County Court properly allowed the plaintiff to recover for this article.

II. The defendant also contends that the County Court erroneously refused to apportion the costs, under sec. 1451, R. L., which reads: "When an action, pending in a County or Supreme Court, involves the trial of several and distinct issues, or of several and distinct claims, the court in taxing the costs shall allow to each party the costs accruing upon the issues or claims upon which he prevails." This section was incorporated into the statute law of the State in 1856, and, in legal effect, has remained unchanged. The only changes are merely verbal, and were made in the revision of 1880. This section of the statute first came before this court for construction in 1865, in *Brainerd v. Casey*, 37 Vt. 479. The only questions in that case related to costs, and the principal one was the construction of this section of the statute. It seems to have received the careful consideration of the court, and the opinion was prepared by that careful and painstaking judge, LOYAL C. KELLOGG. It is there held that this section of the statute applies, only when the issues and claims are several

and distinct, and has no reference to the constituent parts of a single general issue or claim, and to the issues and claims made by the pleadings, and not to those arising on the testimony. This decision has remained unquestioned by the court, and the statute has remained unchanged by the legislature, for over twenty years since the statute was thus construed. *Carleton v. Taylor*, 50 Vt. 220 and *Engrem v. Myers*, 54 Vt. 628, enforce the construction placed upon this section of the statute in *Brainerd v. Casey*, *supra*. Whether correct or incorrect, the construction then placed upon this section of the statute is the recognized law of the State, and it would ill become the court to make any change therein. Applied to this case, the County Court properly refused to apportion the costs of the parties in accordance with the issues made by the evidence. The issue made by the pleadings was single, whether the defendant had converted to his use any of the articles named in the declaration which belonged to the plaintiff as administrator. The several articles therein named formed the constituent parts of this single issue made by the pleadings. That issue, the referee has found in favor of the plaintiff, against the defendant.

The judgment is affirmed.

## DARWIN H. ROBERTS v. CHARLES W. ATHERTON.

*Bankruptcy. Insolvency. Discharge. Bills and Notes.*

R. L. s. 1856.

A discharge under our insolvent law is not a bar to recovery upon a note owned by one, who, when the discharge was granted, was a citizen of another state, and who in no way became a party to the insolvency proceedings, although the note was executed in this State, and when executed both parties to it were citizens of this State.

ASSUMPSIT upon a promissory note. Heard by the court September Term, 1887, TYLER, J., presiding. The court held that the discharge in insolvency was not a bar, and rendered judgment for the plaintiff. No place was designated in the note where it was payable. The other facts are stated in the opinion.

*J. J. Monahan* and *L. F. Wilbur*, for the defendant.

The note being payable generally was payable in Vermont. *Peck v. Hibbard*, 26 Vt. 701; 12 N. H. 520. The discharge bars a recovery, The contract was to be performed here, and the *lex loci* governs and is a part of the contract. *Mather v. Bush*, 16 John. 233; *Blanchard v. Russell*, 13 Mass. 1; *Sherill v. Hopkins*, 1 Cow. 107; Story, Conf. Law, ss. 278, 317, 332; 6 Cranch, 221. A discharge is a bar where contracts are made in a state or jurisdiction where both parties reside and are citizens and where the proceedings in insolvency are taken by the debtor and the debtor obtains his discharge, though the creditor has removed out of the state or jurisdiction before proceedings in insolvency and has taken no part in the insolvent proceedings. *Smith v. Mead*, 3 Conn. 253;

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Roberts v. Atherton.

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*Stoddard v. Harrington*, 100 Mass. 87; *Brigham v. Henderson*, 1 Cush. 430; *Converse v. Bradley*, Ib. 434; *Proctor v. Moore*, 1 Mass. 198; *Brown v. Bridge*, 106 Mass. 563; *Stevens v. Norris*, 10 Foster, 466; 44 N. Y. 598; 39 N. Y. 342; 1 Dan. Neg. Inst. s. 874; 14 N. H. 38.

*M. H. Alexander*, for the plaintiff.

The fact that both parties were residents of the state at the time of the making of the contract makes no difference. The debt attends the person of the creditor, and if he is without the jurisdiction of the court no legal notice can be served upon him so as to bring him within its jurisdiction, and hence no legal default. State insolvency laws have no extra-territorial operation. *Bedell & Warden v. Scruton*, 54 Vt. 493; *McDougell v. Page*, 55 Vt. 196; *Pratt v. Chase*, 44 N. Y. 579; *Soule v. Chase*, 39 N. Y. 342; Wait Act. & Def. 163; 5 Atl. Rep. 710; 4 Atl. Rep. 791; *Hawley v. Hunt*, 27 Iowa, 303.

The opinion of the court was delivered by

Ross, J. The note on which recovery is sought was given in this State to the plaintiff, then a resident of the State, by the defendant, then also a citizen and resident of the State.

The plaintiff removed from the State. Subsequently the defendant was adjudged an insolvent and by due course of proceedings received a discharge in the court of insolvency. The plaintiff in no way became a party to the proceedings in the court of insolvency in which the defendant obtained his discharge. The single question presented by the exceptions is, did the discharge thus procured by the defendant discharge the debt due the plaintiff evidenced by the note? We think it is clear that it did not. It is now fully established by the decisions of the United States Supreme Court, and of most of the state courts of last resort that state insolvent laws can have no jurisdiction beyond the limits of the state in and for which they were enacted, and that if the debt is of such a

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character that it follows the person of the creditor, no matter where made, or where to be paid, to give a state insolvent court jurisdiction of the debt it must have jurisdiction of the owner of the debt. At one time it was held by the Supreme Court of Massachusetts that if the debt were created and to be discharged in that state, the state insolvent court had jurisdiction to discharge the debt notwithstanding its situs was with the person of the owner and the owner did not reside in the state and did not take any part in the proceedings which resulted in granting the discharge. This doctrine was expressly denied by the United States Supreme Court in *Baldwin v. Hale*, 1 Wall. 223; and it was held that to discharge such a debt, it was necessary that the court of insolvency should obtain jurisdiction of the owner of the debt, which could be obtained only when he resided in the state, or submitted to its jurisdiction by proving his debt, or otherwise becoming a party to the proceedings. That case arose in the state of Massachusetts, and was taken to the United States Supreme Court from United States Circuit Court of that state. This decision has been generally followed, and has been substantially followed in this State in *Bedell & Warden v. Scruton*, 54 Vt. 493; *McDougal & Young v. Page*, 55 Vt. 187. See also other cases cited by plaintiff's counsel. The statute, R. L. s. 1856, cannot be given force beyond the jurisdiction which the court obtained over the plaintiff at the time the petition was filed. It then had and could have no jurisdiction over the plaintiff. He was then a resident and citizen of another jurisdiction. He did not in any way submit to the jurisdiction of the court.

The judgment of the County Court is affirmed.

**TOWN OF HUNTINGTON v. A. H. CHESMORE.**

*Statute of Limitations. Agent. Interest. Bills and Notes.*

If A enters into a valid contract with B to pay his demand note, but there is not a novation of the parties to the note, and pays the interest annually in accordance with his agreement, such payment has the same effect in respect to the Statute of Limitations as though made by B himself.

**ASSUMPSIT.** Pleas, general issue and Statute of Limitations. Trial by court, April Term, 1887, ROWELL, J., presiding. Judgment for the plaintiff.

The suit was brought to recover the amount of a certain promissory note, dated March 1, 1868, and signed by L. C. Snyder, A. H. Chesmore and Hiram Shattuck. The note was given for \$100, and payable to the treasurer of the plaintiff town.

The writ was dated February 26, 1886. It was found by the referee that the last payment of interest on the note was made by one Sidney Gillett, and was made later than March 10, 1880; and that the interest was endorsed on the note each prior year from the date of the note up to and including 1880. The defendant denied that he paid any interest subsequent to January 14, 1874; and it was found that the interest after that date was paid by said Gillett. .

In the early part of the year 1868 the makers of said note were engaged in the manufacturing of lumber as partners. During the same year they procured an act of incorporation, and organized a corporation known as the "Forest Dale Lumber Co.," which corporation took the property and business of said co-partnership with all of its property, and agreed to assume and pay all of its outstanding liabilities, one of which was the note in suit.

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The defendant took a considerable amount of the capital stock of said corporation which he owned and held until January 14, 1874, on which day he sold and assigned the whole of it to one Sidney M. Gillett, receiving therefor about one-half its par value. At that time Gillett executed his notes to the defendant for about one thousand dollars, and pledged the stock that day purchased as collateral security therefor.

After this transaction was completed, but on the same occasion and before the parties had separated, the defendant, as an afterthought, asked Gillett for a personal guarantee against debts outstanding against the old firm of Snyder, Chesmore & Shattuck. Whereupon said Gillett executed the following agreement :

“ This agreement witnesseth :—That Sidney M. Gillett, of Huntington, agrees to clear A. H. Chesmore, of Huntington, from all debts due from the firm of Snyder, Chesmore & Shattuck, by paying the same.

“ SIDNEY GILLETT.

“ Huntington, January 14, 1874.”

*Hard & Cushman*, for the defendant.

The payments made by Gillett were made with his own funds, and not with those furnished by the defendant. The sale and delivery of the stock had been fully completed and executed before the writing was mentioned (as an “afterthought”), and the writing was executed without consideration, and so far as it can have any legal effect, was what the defendant called for, only a “guaranty against outstanding debts.”

The only question presented by the case is : Did the acceptance by the defendant of the writing executed by Gillett constitute him the agent of the defendant, so that Gillett could legally perpetuate the note in question? No such agency was created by that paper, nor by the previous sale of the stock. “ But it is not enough that the agent is authorized to make the payment. His authority must enable him to bind the

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principal by a *promise to pay*; and such authority cannot be implied from the mere authority to make the payment." *Brown v. Latham*, 58 N. H. 30.

See *Harper v. Fairley*, 53 N. Y. 442; *Smith v. Ryan*, 66 N. Y. 352; 7 Wait Act. & Def. 304.

A payment of interest more than *six years after the writing was made* cannot be regarded in any sense as a payment by the defendant. The most favorable view for the plaintiff which can be taken of the transactions between Gillett and the defendant, on the 14th January, 1874, is, that those transactions so far created an agency in Gillett that payments by him made in a *reasonable time* thereafter on the debts then due from the firm, would save such debts from the statute bar. Ang. Lim. s. 247; *Porter v. Blood*, 5 Pick. 54; *Reed v. Hurd*, 7 Wend. 408 (Bk. 11 L. ed. 178); *Havan v. Hathway*, 2 Appleton (Me.), 345; *Gowan v. Foster*, 3 B. & Ad. 507.

*Roberts & Roberts*, for the plaintiff.

The law is that from part payment of a debt the law implies an acknowledgment of the remainder of the debt to be due. *Ayer v. Hawkins*, 19 Vt. 26; *Goodwin v. Buzzell*, 35 Vt. 9; *Corliss v. Grow*, 58 Vt. 702; *Hollister v. York*, 59 Vt. 1; R. L. s. 974.

The payment was not of Gillett's debt, for he owed the plaintiff nothing, and the plaintiff claimed nothing of him. Those payments made through Gillett went in reduction of the defendant's debt; they were procured by the defendant to be made, he furnishing the funds for that purpose, with a stipulation secured for their application; thus making Gillett, at the least, his agent to make the payments. *McConnell v. Merrill*, 53 Vt. 149; *Bailey v. Corliss*, 51 Vt. 366; *Burnett v. Snyder*, 45 N. Y. 577; 11 U. S. Dig. N. S. 554; *Delavan Bank v. Cotton*, 53 Wis. 31; 13 U. S. Dig. 585; *Littlefield v. Littlefield*, 91 N. Y. 203; *Forsyth v. Bristome*, 8 Exch. 715; 6 Jac. Fish. Dig. 8665.



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The opinion of the court was delivered by

ROYCE, Ch. J. The writing given to the defendant by Sydney M. Gillett, under date of January 14, 1874, and the acceptance of it by the defendant, constituted an agreement between the parties by the terms of which Gillett was to pay, for and on account of the defendant, all debts due from the firm of Snyder, Chesmore & Shattuck. One of those debts was the note in suit. There was no novation of the parties to this note, and the defendant's liability to pay it remained unaffected; but the defendant agreed with Gillett to pay the note for him; and, as the referee finds, rested upon that agreement, and gave no further thought or attention to the note himself until his attention was called to it in 1882 by the payee, to whom he replied that it was Gillett's business to see him clear of that debt.

The note was, by its terms, payable on demand, with interest annually. When the defendant contracted with Gillett to pay the note for him, it cannot be said, therefore, that payment at a time certain, as upon the maturity of a note payable on a date or at the expiration of a time fixed by its terms, was contemplated. The defendant contracted with Gillett, for his own benefit and advantage, to pay the note for him according to its tenor, which would be whenever payment was demanded by the payee, and must have authorized Gillett to do what he, by contract and agreement, bound him to do, so far as any authorization might be necessary from, and could be given, by the defendant. The payment of interest annually, until such time as the principal should be paid, was incident to the debt, and a part of the contract evidencing it; so when the defendant bound Gillett to pay this note for him, he bound him also to pay the interest on it, annually, until he discharged the principal, and must have authorized Gillett to the same extent as he bound him in respect of the matter.

The law of this State gives the effect of a new promise to the part payment of a debt, when made by a person having authority to make such payment, and without protestation

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against further liability. The annual interest on this note became a part of the debt evidenced by it, due at the end of each year; and it must be presumed that the defendant and Gillett, when they made their agreement, made it with the understanding that each payment of interest that might be made by Gillett under such agreement, for the defendant, would have the legal effect of a new promise to pay the debt. The defendant could not contract with Gillett to do a certain thing and then say that he did not authorize him to do it. If one contracts with another to discharge for him a certain duty or obligation in a certain way, or to execute for him an agreement which in itself provides the manner in which it shall be carried out, he must necessarily confer authority to act and represent which is commensurate with the obligation imposed and accepted. The defendant could not contract with Gillett to make for him these payments which the defendant was under a legal obligation to make himself, and by some mental reservation and without the consent of the payee, give to those payments a different legal effect, or withhold from them a legal effect, which they would have had if made by himself. This certainly must be true so long as Gillett followed strictly the terms of the contract which the defendant had bound him to carry out. Had the payments of interest been after maturity of the note, or otherwise at variance with the letter of its terms, a different question might be presented, and the question of the extent of Gillett's agency or authority become matter for consideration. But so long as Gillett was doing for the defendant precisely what the defendant had bound him to do, carrying out the contract he had assumed for the defendant precisely according to its terms, his act must be regarded as the act of the defendant, and its legal consequences the same as if done by the defendant himself. In the language of *Smith v. Ryan*, 66 N. Y. 352, cited by the defendant's counsel, Gillett had authority, under his agreement with the defendant, "to perform for the party the very act which is to be the evidence of a new promise."

The judgment is affirmed.

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## MALANEY &amp; BLAKEY v. LESLIE TAFT.

*Bailment. Negligence. Burden of Proof. Trover. Action on the Case.*

1. In an action on the case for negligence against the bailee of a horse for hire, the burden is on the plaintiff throughout the trial to prove negligence; and it is not shifted by merely showing that the horse was sound when delivered to the bailee, and when returned, that it was injured in a way that does not ordinarily occur without negligence.
2. The rule that prevails in an action of trover as to the liability of a bailee, who violates the contract of bailment, does not apply in an action on the case for negligence. Thus, in an action for immoderate driving and improper care of the plaintiffs' horse where his evidence tended to show that the defendant drove a greater distance than he engaged for, and that the horse was sound when taken by the defendant, but injured when returned, it was *held*, that there was no error in the charge of the court, that the gist of the action was negligence, and that there could be no recovery, unless the jury found that the horse was injured by improper use, care, or driving.

ACTION on the case for negligence in improper using and immoderate driving of the plaintiffs' hired horse. Trial by jury, April Term, 1887, ROWELL, J., presiding. Verdict for the defendant.

The plaintiffs asked the court to instruct the jury :

1st. "That if the jury find that defendant used said horse for a different purpose or to perform a longer journey than that for which it was hired, then the defendant takes upon himself the risk of all accidents or disabilities which may befall the property hired, and must make all damages good to the plaintiffs."

2d. "That when property in the exclusive possession of the bailee for hire is injured in a way that does not ordinarily occur without negligence, as the plaintiffs' evidence tends to

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show in this case, then the burden of proof is upon the bailee to show that it was not occasioned by his negligence."

3d. "If the jury find that the defendant drove said horse beyond the limits of the bailment, this fact alone renders him liable for all damages sustained by the plaintiffs."

The court refused to charge as above requested, but did charge on the first request as follows :

"1. Upon the declaration as drawn, the gist of this action is negligence on the part of the defendant. And unless you find that the horse was injured by improper use, management, driving or care by the defendant, the plaintiff cannot recover."

"2d. Now, although it may be true that if he went outside of the bailment and anything happened to the horse, although without his fault, he would be liable; yet, the plaintiffs cannot avail themselves of that in this action, because they have not properly declared in the declaration, and their case must be tried upon the issue that is there set forth.

"They do not declare and say that by reason of driving outside of the bailment any damage was done to this horse; they simply describe the journey, and state that part of it was outside of the bailment; and then say that in the performance of that whole journey, all around, by reason of immoderate and improper driving and usage of the horse, it was injured. So that is the question.

"If you find that the defendant immoderately drove the horse, or negligently and improperly and carelessly fed and watered and looked after it, whether within or without the terms of the bailment, and by means thereof the horse was injured and damaged, then the plaintiffs are entitled to recover. To entitle the plaintiffs to recover, you must find that the condition of the horse (whatever it was that the horse exhibited on his return by the defendant) was occasioned by some improper driving or some improper care in the management of the horse while he had it in his possession."

And on the second request the court charged as follows, to wit :

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“ If you find that the horse was in a different condition from what it was when the defendant took it, then it will devolve upon you to determine how it came to be in that condition, whether or not it was in that condition by reason of any improper driving or treatment of it by the defendant.

“ The court cannot say to you—the law cannot say to you—that if the horse did come in changed in condition as the testimony on the part of the plaintiffs tends to show, that therefore the plaintiffs are entitled to recover, unless the defendant accounts for that condition, that is a question for you to decide.”

*M. H. Alexander* and *L. F. Wilbur*, for the plaintiffs.

If the defendant departed from his contract of bailment, he would be liable to the same extent as if he had taken the horse without permission. *Towne v. Wiley*, 23 Vt. 355. The court should have complied with the plaintiffs' second request. 3 Wait Act. & Def. p. 620; *Logan v. Matthews*, 6 Penn. St. 417; *Collins v. Bennett*, 46 N. Y. 490; *Brown v. Waterman*, 10 Cush. 117; *Shear. & Redf. Neg. s. 13*, 220; *Georgia R. Co. v. Willis*, 28 Ga. 317; *McDaniels v. Robinson*, 26 Vt. 316; *Rowell v. Fuller's Estate*, 59 Vt. 688.

The plaintiffs were entitled to recover, when they proved that the horse was used outside the contract of bailment, or was injured in such unlawful use. 3 Wait Act. & Def. pp. 615, 618; *Schenck v. Strong*, 4 N. J. L. 87; *Homer v. Thwing*, 3 Peck. 492; *Lewis v. McAfee*, 32 Ga. 465; *Perham v. Coney*, 117 Mass. 102; *Lucus v. Trumbull*, 15 Gray 306.

It was a breach of contract, and the damages can be recovered in an action *ex contractu*, or on the case. 2 Chit. Pl. 337, 669; *Bright v. McKee*, 37 Vt. 161-164; *Dean v. McLean*, 48 Vt. 412; *Bank of Orange v. Brown*, 3 Wend. 158; 1 Chit. Pl. 132, 134, 135; *Sarjeant v. Blunt*, 16 Johns, 73; *Cairns & Lord v. Bleachers*, 12 Johns, 300; *Rotch & Hawes*, 12 Pick. 136.

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*S. H. Davis*, for the defendant.

The charge of the court under the declaration was correct. The gist of the action was negligence, and the plaintiffs were bound to prove it. 1 Greenl. Ev. s. 80, p. 107; Story, Bailm. ss. 454, 457. It was incumbent on them to show that the horse was injured by the fault of the defendant. *Barrington v. Snyder*, 3 Barb. 380. Negligence is a question of fact to be found by the jury; and the burden is on the plaintiffs to prove it by a fair balance of testimony. Story, Bailm. ss. 213, 421; Edwards, Bailm. ss. 172, 399; Story, con. 451; 8 R. 630; 13 R. 387, 421; *Kemp v. Phillips*, 55 Vt. 99; *Selleck v. Wells, Fargo & Co.* 109 Mass. 542, 556; *Schmidt v. Blood*, 9 Wend. 269; *Maynad v. Buck*, 100 Mass. 40; *Stowe v. Bishop*, 58 Vt. 500; *Kennedy v. Morgan*, 57 Vt. 48; 2 Barb. 327; *Harsley v. Branch*, 1 Humph. 109; 2 Greenl. Ev. s. 231; *Dressler v. Davis*, 7 Wis. 527; *Edwards v. Carr*, 13 Gray, 234; *Holmes v. Watson*, 29 Penn. St. 457; *Shiphard v. Harlow*, 3 Allen, 176; *McCully v. Clark*, 40 Penn. St. 399; 8 Allen, 234.

The defendant was bound to use only ordinary care. 7 Cow. 499. The injury must have resulted exclusively from the wrong of the defendant. *Waters v. Weng*, 59 Penn. St. 211; 57 Penn. St. 374; 1 Hill. Torts, pp. 121, 126; 29 Me. 307; 2 Kent Com. (9th ed.) 791; *Harris v. Packwood*, 3 Taunt. 264; *Marsh v. Horn*, 3 B. & C. 322; 1 Par. Cont. 606. Want of ordinary care and skill must be shown, or the defendant is not liable. 117 Mass. 102.

The opinion of the court was delivered by

TAFT, J. There are two questions in this case:

I. The plaintiffs claimed on trial that they let the horse to be driven from Jericho to Hinesburgh and return; that the defendant, at Richmond, a point on the route, left the route and drove from Richmond to Huntington and back to Richmond. If the evidence satisfied the jury of this fact, and that he did so without the consent of the plaintiffs, the defendant

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might have been liable in an action for trover. *Hart v. Skinner*, 16 Vt. 138; *Towne v. Wiley*, 23 Vt. 355. But this action is a case for improperly caring for, and ill-treating the horse. For all damages arising from such acts and neglects, wherever the horse was driven, the charge permitted a recovery. The plaintiffs, therefore, had an opportunity to recover all damages declared for. There was no error in the action of the court upon the first and third requests.

II. The second request of the plaintiffs to charge was :

“That when property in the exclusive possession of the bailee for hire is injured in a way that does not ordinarily occur without negligence, as the plaintiffs’ evidence tends to show in this case, then the burden of proof is upon the bailee to show that it was not occasioned by his negligence.”

It is conceded by the plaintiffs that the burden of proof in the first instance was upon them; that it was incumbent upon them to show that the injuries to the horse were occasioned by the negligence of the defendant; but they insist that they discharged that duty and relieved themselves of that burden by showing that the horse was delivered to the defendant in a sound condition and returned injured in a way that does not ordinarily occur without negligence. That having shown these facts the burden shifted and rested upon the bailee to show that the injury was not occasioned by his negligence. Whether they were entitled to have this request complied with depended upon the duty of the defendant in respect to the horse. The request may embody sound law had it been the defendant’s duty to return the horse in the same condition in which he received it; but his duty was performed if, during the bailment he had exercised due care, and had been guilty of no neglect in his treatment of the horse. Had he been free from fault he was not liable although he might not have returned the horse at all. This being the measure of his duty, the burden was upon the plaintiffs to show negligence and rested upon them throughout the trial. The plaintiffs do not establish negligence by showing the facts stated in the request; the facts may have

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been true and the defendant guiltless of any improper conduct in respect to the horse; the injuries may have arisen from some cause wholly disconnected with the care or use of the horse. However potent the facts tending to establish the defendant's guilt may be, there is no time during the trial that the plaintiffs are entitled to have them withdrawn from the consideration of the jury and a verdict ordered, upon a simple showing that the horse when returned was not in the condition it was in at the time of the bailment, as stated in the request. This case should be distinguished from those where the defendant is under an obligation to return or deliver property in the condition that it was in when he received it. In suits against common carriers, innkeepers, and perhaps some others, a different rule may apply.

The cases mainly relied upon by the plaintiffs do not aid them. *Collins v. Bennett*, 46 N. Y. 490, was an action of trover, and a conversion of the horse, as the court said, "was clearly proved and no question could therefore arise as to the burden of proof." The discussion by PECKHAM, J., of a question which he says was not in the case, is not law. The cases cited by him in support of his views are mainly those against common carriers and innkeepers. *Logan v Matthews*, 6 Pa. St. 417, is a case very similar to this in its facts; but the instructions of the trial court which were sustained, were: "When the bailee returned the property in a damaged condition and fails, either at the time or subsequently, to give any account of the matter in order to explain how it occurred, the law will authorize the presumption of negligence on his part. But when he gives an account, although it may be a general one, of the cause, and shows the occasion of the injury, it then devolves on the plaintiff to prove negligence, unskillfulness, or misconduct." We by no means concede this charge to be law, but if it is, the plaintiffs' case is not within it, as it does not appear that the defendant failed to give an account of his expedition, and "his testimony tended to deny and disprove every claim and contention of plaintiffs tending



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to fix any liability upon him," in which contingency, as the rule is laid down in that case, it devolved on the plaintiffs to show negligence. Neither is the case cited of *Rowell v. Fuller*, 59 Vt. 688, in point. That action was assumpsit to enforce a contract obligation to return notes on demand, if the defendant did not fulfill his contract, and failed to return the notes he was liable and the burden was upon him to show the cause of his failure if he wished to be relieved from it. We understand our ruling upon this question has always been the doctrine of the English courts, applied in some instances to common carriers. *Cooper v. Barton*, 3 Camp. 5, note, "was an action of assumpsit for not taking proper care of a horse hired by defendant of plaintiff. The plaintiff proved the hiring of the horse; that it was returned to him with his knees broken in consequence of a fall, whilst used by the defendant, and that the horse had before that time been often let out to hire, and had never fallen down. The plaintiff contended that this was a sufficient case to go to the jury, although he had given no evidence of negligence; because as he had shown that the horse was a good horse, and not in the habit of falling, it must be presumed that the fall was occasioned by negligence, and it was for the defendant to prove the contrary if he could. LEBLANC, J., however, said that the plaintiff must give *some* evidence of negligence; and as he had given none in this case the plaintiff must be nonsuited."

The same rule applies in case of a warehouseman whose duty it is to keep goods entrusted to him with due care. *Willett v. Rich* (Mass.), 2 New Eng. Rep. 672.

Bearing in mind the liability of the bailee in a case like the one at bar, there need be no difficulty in arriving at a correct result and reconciling the cases that apparently are in conflict.

Judgment affirmed. All concur.

## ALFRED W. HOWARD v. LUCRETIA H. WITTERS.

*Chattel Mortgage.* R. L. s. 1965.

1. A chattel mortgage of personal property is superior to a prior real estate mortgage in common form covering the same property, when the mortgagee in the chattel mortgage is in the position of an innocent purchaser.
2. When one sells personal property, and the title passes absolutely, an ordinary real estate mortgage of the same to secure the purchase money is not valid as a vendor's lien as to subsequent *bona fide* purchasers.
3. The loss of the note secured by a chattel mortgage after the property has been sold by an officer in behalf of the mortgagee, does not affect the legality of the seizure; and in an action of trover between innocent purchasers, involving the title to the property, the mortgage was admissible, and also testimony as to the loss.

TROVER for taking live stock and farming tools. Trial by jury, September Term, 1887, TYLER, J., presiding. The court ruled that the real estate mortgages, under which the plaintiff claimed, were not operative to form any title or lien, as against the chattel mortgage under which the defendant claimed, and directed a verdict for the defendant. The case is stated in the opinion.

*H. N. Deavitt* and *O. P. Ray*, for the plaintiff.

The plaintiff's mortgages are valid as between the parties and all persons having notice, or who could have obtained information by proper inquiry. 48 Vt. 602. The defendant is charged with all facts which she could have learned by proper inquiry. 16 Vt. 109; 17 Vt. 329; 22 Vt. 372; 36 Vt. 684.

The mortgages were operative as a vendor's lien. R. L. s. 1992. Trover will lie. Hair. Dig. p. 487, s. 274; 12 N. H. 385.

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*H. E. Powell, W. L. Burnap and C. W. Witters*, for the defendant.

The plaintiff's mortgages contain none of the elements required by the chattel mortgage statute. R. L. s. 1965. They are ineffectual as to the personalty. *Stafford v. Adair*, 57 Vt. 63; *Tarbell v. Jones*, 56 Vt. 312. There was no notice, actual or constructive, to the defendant. The mortgages were not valid as a vendor's lien. R. L. s. 1992. The mortgage alone, without the note, was sufficient to establish the defendant's title. *Smith v. Johns*, 3 Gray, 517; 1 Jones, Mort. s. 71; 46 Vt. 80; 2 Jones, Mort. s. 924, 1469.

The opinion of the court was delivered by

POWERS, J. Lafave and wife conveyed a farm, together with the live stock and farming tools in question, to Chevalier on the 20th day of May, 1882. This conveyance was by a warranty deed, and the personal property passed absolutely. To secure the purchase money, Chevalier, on the same day, executed an ordinary real estate mortgage to the plaintiff to secure \$1,000 advanced by the plaintiff to Mrs. Lafave for Chevalier, and another mortgage to Mrs. Lafave to secure the balance of the purchase money, and in both said mortgages attempted to mortgage said personal property.

In December, 1883, Chevalier, who had been in possession of the farm and personal property since May 20, 1882, executed to the defendant a chattel mortgage of the personal property purchased of Lafave, as above stated, to secure a loan then made to him by the defendant. Before taking the chattel mortgage the defendant examined the records of personal mortgages and liens in the town clerk's office, and found no encumbrance upon the property, and had no actual notice of the contents of the plaintiff's deed.

The mortgage of the personal property by Chevalier to the plaintiff was valid between the parties as a common law mortgage. But as to subsequent purchasers, it created no lien upon the property. It lacked the formalities requisite under our

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statute to constitute a valid chattel mortgage as against the defendant.

It was not valid as a vendor's lien. The title did not pass from Lafave to Chevalier conditionally, but absolutely. Lafave did not undertake to retain the title when he parted with the possession, but conveyed both to Chevalier, and undertook to make security by way of mortgage back from Chevalier. This cannot be done as against innocent purchasers under our statute relating to vendors' liens.

The defendant's mortgage was properly executed to secure a *bona fide* debt, and it must take precedence of the plaintiff's improperly executed one.

The plaintiff and defendant are two innocent parties suffering from the default of Chevalier, but the plaintiff and his assignor made possible the contingency that has happened.

The defendant's note, secured by her chattel mortgage, had been lost at the time of the trial, but it appeared that the officer making the sale had it at the time of sale, and his computation of the indebtedness secured by the mortgage was based upon it. If Chevalier owed the debt secured by the mortgage, the defendant had the right, under the statute, to seize the property and sell it. If the note then or since happened to be lost the seizure is none the less legal.

The judgment is affirmed.

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Willbur v. Ray.

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L. F. WILBUR v. EDWARD FLANNERY AND  
O. P. RAY, TR.

*Clerk of Court. Trustee Process.*

Money in the possession of the clerk of the County Court, paid to him under a decree of the Court of Chancery, is attachable on trustee process, when the purpose of the legal custody has been accomplished, and the only duty of the clerk is to pay the money to the defendant.

TRUSTEE PROCESS. Heard on a commissioner's report, April Term, 1887, ROWELL, J., presiding. Judgment against the principal defendant; and judgment *pro forma* that the trustee be discharged. The case appears in the opinion of the court.

*L. F. Wilbur and W. L. Burnap*, for the plaintiff.

The statute of this State subjects every person to the trustee process having any goods, effects or credits of the principal defendant entrusted or deposited in his hands or possession, or which shall come to his hands or possession after the service of the writ and before disclosure is made. R. L. ss. 1068, 1071, 1079; *Hurlburt v. Hicks and Tr.* 17 Vt. 197; 59 Vt. 682; 18 Vt. 587.

The principal defendant could have maintained an action for money had and received against the trustee for these funds, especially after demand. *Prentiss v. Bliss*, 4 Vt. 515; *Denton v. Livingstone*, 9 Johns. 96; *Dale v. Birch*, 3 Camp. 346; *Longdill v. Jones*, 1 Stark, 276; *State v. St. Johnsbury*, 59 Vt. 337; *Hoyt v. Swift*, 13 Vt. 129; 9 Vt. 295.

Officers, clerks of court, etc., are amenable to trustee process, after the final order of the court as to the funds has passed. *Adams v. Bennett*, 2 N. H. 374; *Drake Attach.* p. 427; *Lovejoy v. Lee*, 35 Vt. 430; *Hurlburt v. Hicks*, *supra*; *Weaver*

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v. *Davis*, 47 Ill. 235; *Gaither v. Ballew*, 4 Johns. (N. C. L.) 488; *Langdon v. Lockett*, 6 Ala. 729; 12 Md. 124; 19 Md. 233; 38 Md. 555; 3 Ala. 312; 5 N. H. 519; 38 Vt. 122; 30 Vt. 463, 701; 54 Vt. 526; 43 Vt. 67.

*Seneca Haselton*, for the defendant.

The clerk of the court cannot be held trustee under the circumstances of this case. As a rule no person can be charged as trustee in respect of money which he holds in such a capacity that it may be said to be in the custody of the law. The principle applies with peculiar force in the case of money in the hands of a public officer. *Chesly v. Brewer*, 7 Mass. 259; *Brooks v. Cook*, 8 Mass. 246; *Clark v. Clark*, 62 Me. 255; *Conway v. Armington*, 11 R. I. 116; *Drake Attach.* pp. 492, 514; *Bouvier L. Dict. Art. Attachment*; *Ross v. Clarke*, 1 Dallas, 354; *Voorhies v. Sessions*, 34 Mich. 99; *Drake v. McGavock*, 7 Hump. 132; *Allston v. Clay*, 2 Haywood, 171; *Dolphin v. Layton*, 4 L. R. C. P. Div. 130.

A sheriff is regarded the agent of the creditor rather than of the law; and this is the reason why he can be held trustee. *Felker v. Emerson*, 17 Vt. 101.

The general principle stated above has, however, been fully recognized in this State, and such modifications of it as public policy has seemed to demand, have been made by statute. *Parks v. Cushman*, 9 Vt. 320; R. L. ss: 1070, 1072; *Bradley v. Richmond*, 6 Vt. 121.

See *Dunlap v. Patterson*, 74 N. Y. 145; *Trotter v. Lehigh Zinc and Iron Co.* 2 Cen. Rep. 737; *Fenton v. Fisher*, 106 Penn. 418.

The opinion of the court was delivered by

POWERS, J. In execution of a decree of the Court of Chancery the defendant was ordered to deposit his deed of certain real estate in Underhill with the clerk of that court, upon a deposit with the clerk for the defendant of a certain sum of money. The money and deed were both deposited

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with the clerk in accordance with the decree. The deed was accepted and taken by the party entitled, and the money was ready to be paid to the defendant when it was attached by the plaintiff.

Both parties agree that money *in custodia legis* cannot be attached by the trustee process; and the inquiry is whether the legal grip upon this money had been dissolved.

Our statute is broad and subjects the goods, effects and credits of a debtor in the hands of a third person to the trustee process.

The attaching creditor in such process stands upon the right which his debtor has as against the trustee.

In this case Mr. Ray held money in his hands belonging to the defendant. As clerk of the court he had no further claim upon it. The purpose for which the law gave him its custody had been fully accomplished, and the only duty remaining was to pay it over to the defendant upon his call. If Mr. Ray had refused to pay it to the defendant on demand, the defendant clearly would have an action for the money. This being so, the plaintiff, as a creditor of the defendant, may reach the fund by this process.

The only answer made by the defendant is, that on grounds of public policy, public officials should not be subjected to the trustee process; and this proposition is abundantly fortified by the exhaustive citation of authorities in the defendant's brief. But this case is outside the range of that proposition. Mr. Ray was a mere bailee of the money, not for the court, nor for the parties to the litigation. As respects the deed and the money, which was to be exchanged, each for the other, he was the stakeholder appointed to effect the exchange. Any third person might as well have been appointed as the clerk. A sheriff who has collected money upon an execution is liable to the trustee process. He receives such money under color of his office, and holds it as a public officer. But his process has no further vitality when the money is collected, and he has no remaining duty but to pay over the money.

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In this case, if Mr. Ray had held the money to be paid over *when* the court should so order, he would be exempt from liability. But the order from the court to pay it over antedated its receipt by him, and he was directed to pay when the deed was delivered.

We can see no reason, under the language of our statute, why a clerk, under the circumstances detailed in the commissioner's report, should not be liable to the trustee process. The argument that he may be personally inconvenienced by being called away from his business applies to every other person exposed to this process.

The judgment is reversed, and judgment is rendered on the report that the trustee is chargeable in the amount of the plaintiff's judgment against the principal debtor, and that the trustee recover his costs.



## LAMOILLE COUNTY, AUGUST TERM, 1887.

Present: ROYCE, Ch. J., ROSS, POWERS and WALKER, JJ.

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HENRY H. NYE v. BURLINGTON AND LAMOILLE  
R. R. CO.*Pleading. Railroad. Motion to Dismiss.*

The defendant was sued as "the Burlington and Lamoille Railroad Company, a company organized under the laws of this State," etc. The service of the writ was like that required by the statute, on a corporation, by leaving a copy with its clerk. A motion was filed to dismiss on the ground that the service was illegal; but it did not specify any error, or the method of correcting it. *Held:* (a) That, as there is a general law under which railroad corporations can be organized, it is presumed that the defendant is a corporation organized under this law; (b) That the motion—if the objection is available on motion—is faulty in not pointing out both the defect and its correction.

MOTION to dismiss a writ on the ground that the service was illegal. Heard December Term, 1886, VEAZEY, J., presiding. Motion overruled. Affirmed.

The substance of the motion was that the writ had not been legally served. It appeared from the officer's return that he attached one car, and that he lodged a copy of the writ in the town clerk's office, where the car was attached, and that he also left a copy with the clerk of the defendant company.

*E. R. Hard*, for the defendant.

The defendant in the mandatory part of the writ is described as "the Burlington and Lamoille Railroad Company, a com-

pany," etc.; and there is nothing anywhere in the record which varies this description, or indicates what sort of a "company" the defendant is.

The question presented by this motion to abate must be determined by what appears upon the face of the process, unaffected by any extraneous fact or inference; and the motion should prevail unless it appears by the record that the requirements of the statutes respecting the service of attachment process have been strictly complied with.

It does not appear from the record in this case that the defendant is a corporation, an "association or joint-stock company consisting of five or more members," or a "partnership composed of five or more persons," in which cases, only, service can properly be made by copy to a clerk, etc., as provided by R. L. s. 873, and by the Act of 1882. Acts 1882, No. 71.

The suit must therefore be treated as one against a plurality of natural persons, insufficiently described; and the writ could be served only in the manner prescribed by R. L. ss. 871, 881, if, indeed, any service of so faulty a process could be effectual. The service, therefore, by copy to the clerk is insufficient.

*B. A. Hunt*, for the plaintiff.

The writ was legally and sufficiently served. R. L. s. 873; Acts 1884, No. 99.

It was personal property that was attached and should have been attached as such. 31 Barb. 590; 47 Barb. 104; 52 N. Y. 521; 57 N. Y. 314.

The opinion of the court was delivered by

Ross, J. Conceding, without deciding, that the objection is available on motion, instead of plea, we do not think it is well taken. The defendant, as alleged in the writ, is the "Burlington and Lamoille Railroad Company, a company organized under the laws of this State." The name of the defendant, "Burlington and Lamoille Railroad Company," as

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well as the qualifying clause, "a company organized under the laws of this State," is consistent with the defendant being a corporation upon which service of process can be legally completed only by delivering a copy to its clerk. Pleas in abatement are not favored, and no presumptions are made to uphold them. We have, and for several years have had, a general law under which railroad corporations could be legally organized. It is to be presumed, if any presumption is to prevail, that the defendant is a corporation organized under this law. It is alleged to be a railroad company. The duties of such a company are more or less of a public nature, and of such a character that it is difficult to conceive of their exercise by a copartnership. Nor have we any statute authorizing the organizing copartnerships for the exercise of the functions required for the full construction, operation and transaction of the business of a railroad company. This company is alleged to have been organized under the laws of this State, clearly referring to the general law enacted for the organization of railroad companies as corporations. The rule, applicable alike to motions and pleas in abatement, is, that they must give the plaintiff a better writ, in that they not only point out the error, but also the method of correcting it. 1 Chit. Pl. 446. The motion is faulty in both of these requisites. It neither alleges nor denies the corporate existence of the defendant, nor in what respect the supposed service of the writ upon it is defective, nor in what manner it can be corrected.

The *pro forma* judgment of the County Court is affirmed, and cause remanded to be further proceeded with.

## CALEDONIA COUNTY, MAY TERM, 1888.

Present : ROSS, POWERS, ROWELL and TYLER, JJ.

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ST. JOHNSBURY & LAKE CHAMPLAIN RAILROAD  
COMPANY v. B. A. HUNT.*Railroad. Sheriff. Power to Arrest Engineer on Train.*

An officer having a writ by which he is commanded to arrest the body of the defendant, a railroad engineer, may lawfully stop a train of cars run by such engineer, for the purpose of making the arrest.

ACTION on the case for stopping the plaintiff's cars. Heard on demurrer to the defendant's special pleas, June Term, 1887, VEAZEY, J., presiding.

The court considered that, although the defendant might lawfully have caused his process against Collins to be served by arresting his body, if the officer could have got at him on the train, or off the train at the station when the train stopped without interference of the officer or in his behalf, regardless of the damages to the plaintiff, yet Hunt and his officer had no right to stop the train in order to get at Collins to serve this civil process upon him. As the special pleas do not answer the averment of the declaration in this regard the demurrer is sustained and the pleas adjudged insufficient.

The case appears in the opinion of the court. See same case in 59 Vt. 294, and in 55 Vt. 570.

*P. K. Glead*, for the defendant.

The plea discloses that Hunt had a good cause of action against Collins for a trespass committed by him while acting as agent and engineer of the plaintiff. This case in 59 Vt. 294.

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The defendant obtained a subsequent judgment which Collins paid. It is admitted that Collins was on the train and controlling the engine at the time of the arrest.

The question submitted is this: Had the officer the legal right to stop the train for the purpose of arresting Collins? This case in 55 Vt. 570; Hill. Torts, ch. 1, s. 13.

The plaintiff, therefore, does not stand as unaffected by and innocent of the wrong for which defendant was seeking redress in stopping the train to arrest Collins. If it be unlawful to stop a train to arrest a passenger, how can such a rule apply here? The plaintiff ought not to complain, as he has put on to his engine and kept in his employ this careless servant, Collins, who has injured the defendant. An officer may break open the dwelling-house of a third person to attach the goods or body of the defendant in the process. *Burton v. Wilkinson*, 18 Vt. 186; Smith's Lead. Cas. vol. 1, 218.

May he not as well stop a train as break in a door? Extreme cases might be supposed by way of inconvenience for or against the right claimed. Can not an officer stop a coach full of passengers to arrest one of them? What is the difference in the two acts? Only one of *degree*. The right is precisely the same in both cases.

Again, in this State at least, this is a new attempt to limit the power of an officer in serving legal process. If the public convenience or safety requires this limitation would it not come most naturally from the legislature, like cases under sections 1457 and 1458? Is the court warranted in putting this limitation upon the power of an officer who is commanded to arrest a citizen while the officer has had no means of knowing that his right does not extend to the stopping of a train?

*Ide & Stafford*, for the plaintiff.

It will be observed that there is no answer to the allegation that the defendant stopped the train of the plaintiff and delayed its movements for an hour in order to arrest its engineer upon a little civil cause, except his allegation that he had

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a legal cause of action against the engineer. The question is therefore clearly presented whether one has a right to stop a railroad train for the purpose of arresting any person thereon to answer to a writ in a civil suit.

We are aware of no case wherein this question has been presented. The right to arrest existed at common law and still exists in this State except so far as it has been modified by statute, but the right has never been an unqualified one. On the contrary it has from time immemorial been softened and limited in cases where the full exercise of the power would work injustice or interfere with the right of household privacy, religious decorum or the demands of public policy. We suppose this case will be determined by common law principles; not necessarily by any single case which has heretofore arisen, but by the application of the good sense of the old law as applied to novel circumstances. The common law granted to a plaintiff even in a civil suit the right to arrest the body of the defendant upon mesne process, but, at the same time, announced that the sheriff could not, in executing such a writ, break open the door of a dwelling-house. The reason whereof is thus stated in Bacon's Abridgement, Tit. Sheriff (N) 3: "This privilege which the law allows to a man's habitation, arises from the great regard the law has to every man's safety and quiet, and therefore protects them from those inconveniences which must necessarily attend an unlimited power in the sheriff and his officers in this respect; and hence it is that every man's house is called his castle." In other words the common law thought it better that civil process should go, for the time being, unserved than that authority should be given to a sheriff to enter a man's house against his will and to subject the family to the annoyance of such disturbance and to the abuses likely to accompany the exercise of such power. It has long been the law in England, and it is the law in this State, that civil process cannot be served on the Sabbath. See Bacon's Abr. Sheriff (N) 4; Comyns' Dig. Execution (C) 5; Murfee on Sheriff, s. 156, 161, 268, 932.

It is quite possible that by reason of both of these limitations upon the right of arrest, offenders against civil rights have escaped their deserts, but it would scarcely be claimed that either limitation was unwisely made. The English common law has various illustrations of places (so-called "liberties") where it is unlawful for a sheriff to exercise his functions. Such were the "Verge of the Court" and the "Tower of London." There are no corresponding "liberties" in this country. And these are but examples of the power of the courts to modify the vigor of any common law rule as the exigences of the time demand. Such a question as the present never came within the scope of the ancient law for obvious reasons. Had such a case arisen it is difficult to conceive that the reasons which dictated the ameliorations just mentioned would have allowed an arrest at such a loss to public convenience, and at such violation of the public rights as must follow the permission of the right of arrest under such circumstances as are set forth in the declaration. Railroads have come to be the great thoroughfares for travel and transportation. Upon the punctual movements of their trains great interests depend, both of property and life. This case is not to be decided upon the theory that the plaintiff's only claim to recover rests upon the fact that as an incident of the arrest he lost the service of an employee. That is not the claim we press. The question is one of public policy. In this very case a man with a trifling claim however legal, caused a deputy sheriff to go forth in the middle of the night and swing the danger signal in front of the most important train upon the plaintiff's road, and caused a delay which was actually serious and might easily have been far more so.

The opinion of the court was delivered by

POWERS, J. This case was heard upon a general demurrer to the defendant's third special plea. The declaration in substance charged that while the plaintiff was lawfully and properly operating its railroad in running a train of which Collins was

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the engineer, its engine struck and injured a heifer of the defendant there by the fault of the defendant, wrongfully upon its track, and the defendant knowing he had no legal cause of action against the plaintiff, for the purpose of injuring the plaintiff and delaying and hindering the operation of the railroad, sued out a writ and caused an officer thereunder to arrest the body of Collins, the engineer, by stopping the train for that purpose.

The third plea alleges that the defendant had a legal cause of action against Collins which was equally enforceable against the plaintiff founded upon the negligence of Collins, the plaintiff's servant, in causing the injury to said heifer; that suit thereon was brought against Collins tortwise; that the defence to such suit was assumed by the plaintiff in behalf of Collins, and therein the question whether said heifer was unlawfully and by the defendant's fault upon said railroad track was litigated, and that it was adjudged in such suit that said Collins was in the wrong, and judgment was entered in favor of the now defendant against Collins; and that the arrest of Collins upon the writ in said cause was in pursuance of the defendant's legal right, and no more was done than was necessary to that end.

The question raised and argued before us was whether an officer having a legal process in which he is commanded to arrest the body of the defendant may stop a railroad train for the purpose of making an arrest of the engineer of such train. The defendant in his brief says: "The question submitted is this, had the officer the legal right to stop the train for the purpose of arresting Collins?" The plaintiff in its brief says: "This case is not to be decided upon the theory that the plaintiff's only claim to recover rests upon the fact that as an incident of the arrest he lost the service of an employee. That is not the claim we press. The question is *one of public policy*." The court below sustained the demurrer on the ground that the officer had no right to stop the train to arrest the body of the engineer upon civil process against him.



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It is conceded by the plaintiff that an officer having proper process might lawfully stop a train to arrest its engineer in a criminal proceeding, but the argument is that in civil proceedings, the consequences are, or in conceivable cases, might be so detrimental to the public using the railroad, the court should hold, on grounds of public policy, that the right does not exist.

The process was a legal one commanding the officer to arrest Collins. The command in the process was the command, not of Hunt, but of the law. The officer did not act in making the arrest because Hunt commanded him, but because the law commanded him. Hunt to be sure had invoked the issue of the process, but the sheriff's justification and authority was the command of the process.

Cases may easily be conceived in which, upon considerations of relative convenience and inconvenience, the stopping of a train to serve a justice writ upon its engineer would seem to be ridiculous. But, on principle, would it be any more so, if the train was stopped to serve a writ upon the engineer claiming ten dollars in damages for an assault and battery, than stopping it to arrest him in a criminal proceeding seeking to impose a fine of ten dollars upon him for the same assault? It will hardly do to rest the question upon conjectural difficulties. If it is a question of public policy, it is so because its usual, normal and legitimate consequences are hurtful to the public. As a practical fact there is little danger that officers will have occasion to stop a train for the service of process of any kind. Again, it is conceded that the officer might arrest the engineer at a station on the road. But this would delay the train just as long and work precisely the same inconvenience to the public as stopping it between stations.

It is admitted that an officer might stop a stage coach to arrest the driver. This conceivably might delay the passengers on their way to a railroad station so that they fail to reach a train that their business requires them to take. What is the difference in principle between an act which hinders the passengers

on a public conveyance to the train and an act which hinders him while *on* the train?

If the question is one of public policy it must apply generally to public carriers. But we think the right to arrest cannot be defeated upon any considerations that public policy forbids its exercise in the case of locomotive engineers. The command of the process is the voice of the law speaking to its officer. It is the order of the State of Vermont to do the act complained of. There is no room for the doctrine of public policy in such a case. It is illogical and absurd to say that the command of the law cannot be executed because on grounds of public convenience or expediency, the court thinks it better to nullify the law.

The plea alleges that the defendant's cause of action existed against the plaintiff as well as Collins. The suit for the injury to the heifer might have been maintained against the railroad company. Had it been so brought and had the officers stopped the train to attach railroad property on board, the same mischievous consequences to the public would have resulted as those now portrayed. Can it be claimed that process against a railroad company is not to be served, as it may be against other defendants because it will work inconvenience to the public? Process served upon an individual may work incidental injury to others. If a physician is arrested, his patients may suffer.

It is quite apparent that the argument that public policy forbids the service of process as made in this case is unsound and illogical. The legislature can establish any regulations in the premises that may be needed.

The judgment is reversed and judgment is rendered that the demurrer be overruled and the third plea is sufficient. The cause is remanded with leave to the plaintiff to replead on the usual terms.

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Cowdery v. Johnson.

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## HERVEY COWDERY v. N. M. JOHNSON.

*False Imprisonment. Sheriff. Service of Process.*  
*Deputation. R. L. s. 858.*

1. Under the statute,—R. L. s. 858,—which provides that the sheriff may depute any proper person to serve a writ, or other precept, by indorsing thereon a special deputation, the deputation may be written on a separate piece of paper and attached to the back of the process by the sheriff, or, in certain circumstances, he may authorize another to attach it for him.
2. It is not necessary that the deputation should state that the deputy is a "proper person;" it is presumed that he is such.
3. The court give no countenance to the practice of putting deputations into the hands of a special deputy for him to use as he may have occasion on processes not coming within the cognizance of the sheriff.

TRESPASS for false imprisonment. Pleas, general issue, two pleas in bar, and notice. Trial by court, June Term, 1887, VEAZEY, J., presiding. Judgment for the defendant. The case appears in the opinion of the court.

*Bates & May*, for the plaintiff.

The deputation of defendant required a judicial decision of certain facts and the performance of a corporal act by the sheriff. It is analogous to the authorization by a justice of a person to serve a writ. Sec. 862 R. L. It cannot be done in blank or by proxy, Kellogg, *Ex parte*, 6 Vt. 509. In *Kelly v. Paris*, 10 Vt. 261, an authorization in legal form upon a blank writ which was afterwards filled was held bad, the court holding that it was the amanuensis and not the magistrate who conferred the authority and actually made the appointment. *Ross v. Fuller*, 12 Vt. 270. The statutory form of authorization must be followed. *Edgerton v. Barrett*, 21 Vt. 196; *Washburn v. Hammond*, 25 Vt. 648; *Howard v. Walker*, 39 Vt. 163; *Carr v. Tyler*, 28 Vt. 783; *Dolbear v. Hancock*, 19

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Vt. 388; *Brooks v. Farr*, 51 Vt. 396; *Allen v. Smith*, 12 N. J. L. 159; *Meyer v. Bishop*, 27 N. J. Eq. 141.

The opinion in *Ross v. Shurtleff*, 55 Vt. 177, construes sec. 860. It is not an authority in this case, for the authority there given is by statute.

*Ide & Stafford* and *Harry Blodgett*, for the defendant.

The defendant had the necessary authority to serve the process. The original authorization extended to the final completion of all that could be done under that execution, or any renewals thereof. *Ross v. Shurtleff*, 55 Vt. 177; R. L. s. 860; *Leonard v. Allen*, 13 Mass. 295. The defendant was lawfully deputed to serve the *alias* upon which the arrest was made. *Bellows v. Weeks*, 41 Vt. 603; *Kellogg, ex parte*, 6 Vt. 509; Rob. Dig. 573.

The opinion of the court was delivered by

ROWELL, J. The original and the *alias* executions had been put into the hands of the sheriff for service, and he had deputed the defendant to serve them, but he had returned them unsatisfied. On April 15, 1885, the sheriff left the State, and was gone several days. The day he went away or the day before, Mr. Blodgett, the attorney of the execution creditor, called on him with reference to serving a *pluries* execution. He told Mr. Blodgett he was going away, but if he would bring him the *pluries* before he went, he would indorse upon it a deputation to the defendant, and if he did not get around with it before he went, he would leave a deputation to be pasted onto the back of it. Blodgett did not get round with the execution before the sheriff went, so the sheriff wrote a deputation to the defendant on a slip of paper and signed it, leaving the date blank, and just before he went away gave it to the defendant, and authorized him to fill in the date and to use it as a deputation to serve precepts of the character of executions. At the same time he gave the defendant other similar deputations, and also deputations to serve another kind of writs, and explained

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to him the difference, and directed him to use them by pasting them upon the backs of such writs and other processes as they applied to and as he might be called upon to serve during his absence, and told him he would have occasion to use one of them soon, but did not tell him upon what process. On the same day Mr. Blodgett took out a *pluries* execution and carried it to the defendant, a proper person to serve the same, who thereupon took a deputation applicable to the precept, filled in the date, and handed it to Mr. Blodgett to paste onto the back of the execution, which he did, and then handed the execution to the defendant to serve, and he served it by arresting and imprisoning the plaintiff, and this is complained of as a trespass, for that the defendant was not lawfully deputed to make the service.

The statute provides that the sheriff may depute any proper person to serve a writ by indorsing thereon a special deputation. R. L. s. 858. Although to indorse means to write on the back of, yet it is not necessary under this statute that the deputation should be written upon the very fabric of the process itself. It may be written on another piece of paper and attached to the back of the process by the sheriff, or he may, in certain circumstances, authorize another to attach it for him.

In this case the sheriff's attention was called to the particular execution in question, and he made and delivered to the defendant a deputation applicable thereto and designed therefor, and authorized him to use it thereon, with the intent and purpose of thereby conferring upon him lawful authority to serve the same, and that same deputation, or one like it, but from the exceptions it rather seems to have been the same, was used accordingly, and thereby became and was indorsed upon the execution as effectively as though put there by the sheriff himself. Indeed it was put there by him in the eye of the law; he performed the act by another as his instrument, and the requirement of the statute was fulfilled.

We give no countenance to the practice of putting deputations into the hands of a special deputy for him to use as he

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may have occasion on processes not coming within the cognizance of the sheriff, as this case discloses was done, nor intimation in favor of the validity of such authorizations.

The statute is that the sheriff may depute "any proper person"; and it is claimed that the deputation itself must state that the deputy is a proper person, which this deputation does not do.

It is said to be a general rule that when authority is given *sub modo* the special circumstances that confer it must affirmatively appear. *Brooks v. Farr*, 51 Vt. 396. This was said in reference to the necessity of stating the statutory cause for directing a writ to an indifferent person. It was also said, but not decided, that it would be more consistent with analogy to require it to appear that the person authorized was an indifferent person. But such a requirement would seem not to come within the rule, for the fact of indifference is not of the circumstances conferring the authority to make the appointment, but pertains only to the kind of a person to be appointed; and in *Miller v. Hayes*, Brayt. 21, the fact of indifference was held not necessary to be stated.

We construe the statute under consideration as not requiring the deputation to state that the deputy is a proper person. The next clause of that section is, that when he deems it necessary the sheriff may depute "some person" to serve a warrant in a criminal case. Surely it cannot be necessary in such a deputation to state that the deputy is *some person*. The former clause of the section means no more than the latter, and is the same as though it read *a person*, in which case it would have to be a proper person, that is, one who might legally act, the same as now, and in either case, whether a proper person or not would have to be determined by the general law applicable to the subject. The presumption in favor of the regularity of official acts is sufficient in the first instance and until the impropriety of the appointment is made to appear.

Judgment affirmed.

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Giffen v. Barr.

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## JOHN E. GIFFEN v. JOHN BARR.

*Practice. Chattel Mortgage. Act of 1882, No. 69, s. 2.  
Pleading. Exemplary Damages.*

1. If evidence is legitimate when it is received, its admission is not error, although in the course of the trial it becomes immaterial.
2. In an action upon the Act of 1882, No. 69, section 2, to recover the penalty and damages for failure to discharge a chattel mortgage, evidence was admissible to show the amount of usury in the mortgage note, as bearing on the question of payment of the note, and defendant's duty to discharge the mortgage.
3. In an action based upon section 2, No. 69, Acts of 1882, allowing for failure to discharge a chattel mortgage after performance of its condition, a recovery of "ten dollars for such neglect and all damages occasioned thereby," it is not necessary to declare in two counts, one for the penalty and the other for the damages; but a count including both, at most, would only be open to the fault of duplicity, which could only be taken advantage of by demurrer, and not by exception.
4. Under the general allegation of "other damages," the plaintiff could recover only such as were the natural consequences of the defendant's refusal to discharge the mortgage; but he could not recover for damages resulting from the defendant's false declarations as to the mortgage.
5. As the action is based upon the statute, which limits the damages to \$10. and all damages occasioned by the neglect to discharge the mortgage, exemplary damages are not recoverable.
6. The jury were allowed to give exemplary damages; but the plaintiff was permitted to hold his judgment for the penalty, on condition that he remitted all above \$10.

ACTION on the case to recover a penalty and damages for not discharging a chattel mortgage, as provided by the Act of 1882, No. 69. Trial by jury, December Term, 1887, TAFT, J., presiding. One question was when the application of payments, especially a quantity of hay, should be made. The defendant drew the hay away after the commencement of the suit; but the plaintiff's evidence tended to show that defendant was to take the hay in full payment before it was

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removed from the barn, and the jury were instructed that, unless they found that the hay was to be applied, as the plaintiff claimed, they would find for the defendant.

The evidence tended to show that after the note had been paid, as the plaintiff claimed, and a demand made upon the defendant to discharge the mortgage; that the defendant told the plaintiff that Mr. Sulloway, in St. Johnsbury, had the mortgage; that the plaintiff went to St. Johnsbury and found that Sulloway did not have it, and upon going again to the defendant, was told by him that he had discharged it; that the plaintiff went to the Hardwick town clerk's office to ascertain if he had done so, and found that he had not.

*L. D. Hathaway* and *J. P. Lamson*, for the defendant.

It was error to admit the evidence as to the usury.

The error was not remedied by what the court said afterwards. *State v. Meader*, 54 Vt. 126.

It was error to admit the evidence as to the damages. In order to recover damages there should be two counts.

It was error to allow exemplary damages. *Sewing Machine Co. v. Weeks*, 49 Vt. 342; *Burnham v. Jenness*, 54 Vt. 272; *Burnett v. Ward*, 42 Vt. 80; *Spaulding v. Cook*, 48 Vt. 145; *Sherman v. Johnson*, 58 Vt. 40; *Lombard v. Batchelder*, 58 Vt. 558.

Again, the plaintiff did not claim exemplary damages in opening his case. *Edwards v. Leavitt*, 46 Vt. 126.

*Wilson & Powers*, for the plaintiff.

The evidence of the \$45 was admissible. *Day v. Cummings*, 19 Vt. 496; *Ward v. Whitney*, 32 Vt. 89; *Davis v. Converse*, 35 Vt. 503; *Ewing v. Griswold*, 43 Vt. 400; *Blair v. Ellsworth*, 55 Vt. 417. So was the evidence as to the damage. It was caused by the defendant's wrong. 2 Greenl. Ev. s. 254; *Green v. Donaldson*, 16 Vt. 162.

This evidence was clearly admissible on the question of exemplary damages. *Sedgwick, Damages*, 466; *Earl v.*



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*Tupper*, 45 Vt. 275; *Burnham v. Jenness*, 54 Vt. 272; *Camp v. Camp*, 59 Vt. 667.

The only question as to the allowance of exemplary damages raised by the exceptions, is whether they are allowable when not claimed by the plaintiff's counsel in the opening argument. The exceptions do not show but that they were so claimed. *Isham v. Eggleston*, 2 Vt. 270; *Green v. Donaldson*, *supra*; *Burnham v. Jenness*, 54 Vt. 272; *Eames v. Brattleboro*, 54 Vt. 471.

It has been repeatedly held in this State that defendant's liability to the imposition of a fine in a criminal prosecution is no bar to exemplary damages in a civil suit for the same cause. *Edwards v. Leavitt*, 46 Vt. 126; *Hoadley v. Watson*, 45 Vt. 289.

The opinion of the court was delivered by

Ross, J. I. The amount of the debt secured by the chattel mortgage legally due from the plaintiff to the defendant was necessarily involved in determining whether the plaintiff had fully paid it before demanding that the defendant should discharge the mortgage. If, as claimed by the plaintiff, usury was included in the note secured by the mortgage, he was entitled to show the amount of such usury to enable the jury to determine whether he had fully paid all that was legally due from him to the defendant thereon before he called upon the defendant to discharge the mortgage. Hence, it was not error to admit evidence tending to show that usury was included in the mortgage note. The fact that it became, afterwards in the course of the trial, immaterial to the issue whether usury was or was not included in the mortgage note, did not render the admission of evidence legitimate at the time it was admitted erroneous. This exception is not sustained.

II. The defendant excepted to the admission of any evidence tending to show that the plaintiff had suffered any damages beyond the penalty prescribed by the statute, claiming that the declaration should contain separate counts, one declaring for

the penalty and another for damages. We do not think that this exception is well taken. The action is upon sec. 2 of No. 69 of the Acts of 1882. That section of the act makes it the duty of the mortgagee, after the performance of the condition of a mortgage of personal property, within ten days after being thereto requested by any person entitled to redeem, to discharge the mortgage, and prescribes that for a failure to discharge the mortgage within the time limited, the person entitled to redeem may recover of the person whose duty it is to discharge the mortgage, ten dollars and all damages occasioned thereby, in an action on the case. In declaring upon this provision of the statute, the necessity for separate counts for the ten dollars, the fixed damages, and for all damages occasioned thereby, is not apparent. The fixed damages, or penalty, and all damages occasioned thereby, arise from the same state of facts. It cannot be necessary to repeat the same facts in two counts, closing one with a demand to recover the ten dollars, and the other with a demand to recover all damages, when the right to recover both is given by the same section of the statute and upon exactly the same facts. But if two counts were strictly necessary, one for the fixed and another for the actual damages, including both in one count could not be taken advantage of by exception to the admission of the evidence. At most it would be open to the fault of duplicity in pleading, which must be taken advantage of by demurrer.

III. The declaration counts upon the recovery of "ten dollars and other damages occasioned" by the defendant's alleged refusal or neglect to discharge the mortgage. Under the allegation of "other damages," the plaintiff could recover only such damages as were the natural consequences of the refusal. The plaintiff's time and expenses in going to St. Johnsbury to see Mr. Sulloway did not flow as a natural consequence from the defendant's neglect to discharge the mortgage, but rather from the false declaration that Mr. Sulloway had the mortgage. By the terms of the statute (Sec. 2, Act 1882), it was the

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defendant's duty to discharge the mortgage, not upon the mortgage but upon the record thereof, at the town clerk's office. Hence, the town clerk's office was the place where the plaintiff should have gone to determine whether the mortgage had been discharged. His journey to St. Johnsbury induced by the defendant's falsehood, was special damage, if any, and could only be recovered, if at all, upon a special allegation therefor. It was error to receive this evidence against the defendant's exception upon the general allegation of "other damages," which could only mean the damages naturally arising from the defendant's neglect to discharge the mortgage.

IV. But it is claimed that this evidence was admissible upon the question of exemplary damages. If such damages were recoverable in this form of action, it would be admissible upon that branch of the case. But the court did not confine it to that branch of the case, but told the jury that the plaintiff might recover the damages he sustained in going to St. Johnsbury, which, as we have held, was error.

At the trial the defendant contended that exemplary damages could not be recovered in this action and excepted to the holding of the court to the contrary. We think this holding was error. Whether the plaintiff might not have maintained a common law action for the neglect or refusal of the defendant to discharge the mortgage upon proper request after the mortgage was satisfied, and in such action have recovered upon proof of willful neglect, exemplary damages need not be determined. This is not such an action, but an action upon the statute, by which, for the refusal or neglect to discharge the mortgage upon the record, for a limited time, after a proper request, the plaintiff was entitled to recover a fixed sum, ten dollars, and "all damages occasioned" by the neglect or refusal. The fixed sum of ten dollars was evidently intended as the limit of the damages recoverable for the neglect or refusal above "all damages occasioned thereby." Exemplary damages are based upon the willful misconduct of the defendant in the transaction, are not recoverable as a matter of right, are largely in the

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sound discretion of the jury, and cannot be said to be damages occasioned by the neglect or refusal of the defendant. Having based his action upon the statute, the plaintiff must be confined in recovery of damages to the limits given by the statute. Hence, in this form of action, based as it is upon the statute, it was error for the court to tell the jury that the plaintiff could recover exemplary damages, if he showed he was entitled to any actual damages. For these errors the judgment of the County Court must be reversed. But as these errors do not touch the plaintiff's right to recover the ten dollars named in the statute, the plaintiff would on the record still be entitled to judgment for that sum, if he should remit all above that sum.

The judgment of the County Court is reversed ; and if the plaintiff shall remit all damages above ten dollars within ten days from the filing of this entry then judgment is rendered for the plaintiff to recover ten dollars and his costs less the defendant's costs in this court. On the plaintiff's failure to remit the damages above ten dollars within the time named, the case is remanded for a new trial.

POWERS, J., did not sit in the case.

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## JOHN O. HALE v. GRAND TRUNK RAILROAD.

*Railroad. Mail.*

It is the duty of a railroad company, which carries the mail under a contract with the government of the United States, and by whose regulations postal clerks on mail trains are required to receive at the cars stamped letters and sell stamps, to furnish a reasonably safe passage to and from its mail trains, while stopping at its regular stations, for the purpose of mailing letters; and a failure to provide such passage is actionable negligence.

ACTION on the case for negligence. Heard on an agreed statement, June Term, 1887, VEAZEY, J., presiding. Judgment *pro forma* for the plaintiff, and cause passed to the Supreme Court under section 1390, R. L.

It was agreed: "On November 2, 1885, the defendants were lessees and managers of said railway between Portland, Maine, and Canada line, and had maintained a passenger station at Berlin Falls, New Hampshire, about thirty years.

"The defendants carried the United States mail with route or mail agents on their passenger trains between said Portland and Canada line, according to the laws of the United States, and pursuant to such conditions and regulations as the post-office department had imposed; which may be referred to, receiving therefor the compensation fixed by the department.

"The plaintiff, a traveling salesman, was at Berlin Falls the evening of November 2, 1885, and went to the post office to mail two letters. He there learned that the mail had gone to the railway station, and he immediately went to the station for the sole purpose of mailing the letters on the train. The mail train from Portland to Canada line was due at that station about six o'clock p. m. Plaintiff arrived at the station about five minutes before the train came, and went into the station

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and staid there till the train whistled, and then went outside on to the platform between the main track and side track, across which passengers are accustomed to go in getting off and on the cars. It was a dark and rainy night. As soon as the train stopped, plaintiff turned to the right and started to go to the car on said train which he thought was the mail car, but which was the express car, and was the next car forward of the mail car. In going towards said express car for the purpose of mailing said letters, the plaintiff walked off the platform near the corner, fell and got hurt. There was no railing or other guard, and he fell about 2 1-2 feet. From said corner, as far as the platform extended towards Canada, it was six feet wide. The station was lighted that evening the same as usual. For fifteen or twenty years persons have been accustomed to go to the mail car at this station to mail letters on the car, to which the defendants have made no objection; neither have they ever expressly consented thereto. The defendant's mail cars have letter boxes into which people can deposit letters through the car door.

"The plaintiff exercised due and proper care on this occasion.

"His right to recover depends upon whether or not the defendant is liable for the injury to plaintiff, occasioned by the lack of a railing or other guard on said platform, or in not properly lighting the same while it was being used by plaintiff as aforesaid."

*Geo. N. Dale*, for the defendant.

The defendant sustained no relation at all to the plaintiff. There was none by implication, by contract, and none created by law. The law simply provides that every route agent, postal clerk, etc., shall receive mail matter presented to him. This is a duty imposed on the agent of the government, and no place is specified at which he shall receive it; whether in the station, on the platform, or in the postal car. There is not a word in the statutes or post-office regulations about the

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company having anything to do with the reception by, or delivery to, the postal clerk of this mail.

Section 4000 provides that the railway companies shall carry "all mailable matter directed to be carried thereon without extra charge." How does this relate to the public or any third party? The public is in no way, directly or indirectly, or by the slightest inference, referred to.

In this case the way required by the plaintiff to the mail car was as safe as to the approach to the oats in *Pierce v. Whitcomb*, 48 Vt. 127. In this case the defendant knew nothing about the plaintiff being on the platform. They had no business with him directly or indirectly. They had no connection with the business he was there to do; and now this plaintiff says they should furnish a safe passage to the *express* car so that he could go to the *mail* car to mail his letters. One who enters the premises of a railway company may not always be a trespasser. *Harty v. N. Y. Central R. R.* 42 N. Y. 468; *Patterson v. Philadelphia R. R. Co.* 4 Houston (Del.), 103; *Illinois R. R. Co. v. Hamener*, 72 Ill. 347.

But the company owes him no special duty because he had been permitted to be there. *Hounsell v. Smith*, 7 C. B. N. S. 731; Wood, *Railway Law*, 2d vol. 1270.

Admitting a person on the platform does not impose any obligation on the company to protect him. *Gillis v. Penn. R. R. Co.* 59 Penn. St. 129. Where no relation of business exists between the company and the injured party, there can be no recovery. *Nicholson v. The Erie R. R. Co.* 41 N. Y. 529. See *Johnson v. The Boston & Maine R. R. Co.* 125 Mass. 75; *Sweeney v. Old Colony and Newport R. R.* 10 Allen, 368; *Gaynor v. The Same*, 100 Mass. 208; *Coolbroth v. The Maine Central R. R. Co.* 165.

*Ossian Ray*, for the defendant.

The court will observe that plaintiff called upon none of defendant's employees for information touching the position of the mail car in the train, or in respect to the platform, and he

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did nothing upon their invitation or suggestion. Defendant ought not to be held responsible for the result of plaintiff's blunder in departing from the usually travelled way or path, between the station and the cars, and going off in a wrong direction to the wrong car. There was no contractual relation between the parties. The plaintiff was not a passenger nor freighter. He was not at the station to meet a passenger, or to escort any one aboard the cars, or to transact any business. He was a mere licensee. *Railway Co. v. Bingham*, 29 Ohio St. 364; S. C. 23 Am. Rep. 751.

A licensee is a person who being neither a passenger, servant nor trespasser, and not standing in any contractual relation to the railway, is permitted by the railway to go upon its premises for his own interest, convenience or gratification. *Patterson's Railway Accident Law*, pp. 176-7, s. 185.

As MARTIN, B., said in *Balch v. Smith*, 7 H. & N. 736: "Permission involves leave and license, but it gives no right." A railway, like other owners of real estate, is not liable to licensees for injuries resulting from the condition of its premises, or caused by its failure to maintain those premises in repair, provided there be no such concealed danger as can be considered a trap for the unwary. *Senery v. Nickerson*, 120 Mass. 306; *Vanderbeck v. Hendry*, 34 N. J. L. 472; *Pierce v. Whitcomb*, 48 Vt. 127. But if the plaintiff was invited by defendant to go and put his letters into the post-office car, still the defendant is not responsible for his mistake in going out of the way to the wrong car. 1 Thompson, Neg. p. 308; 10 Allen, 385; *Murray v. McLean*, 57 Ill. 378; Campbell, Neg. s. 32; *Bennett v. Railroad Co.* 102 U. S. 577, 584; 1 Am. & Eng. R. R. Cas. 77; Whar. Neg. s. 349; Shearm. & Red. Neg. ss. 498-9; *Nicholson v. Railroad*, 41 N. Y. 525; *Victory v. Baker*, 57 N. Y. 366; *Railroad v. Schwindling*, 101 Penn. St. 258; 47 Am. Rep. 106; 8 Am. & Eng. R. R. Cas. 544; *Gillis v. Railroad*, 59 Penn. St. 129; *Railroad v. Martin*, 14 Neb. 295; 19 Am. & Eng. R. R. Cas. 236; *Frost v. Railroad*, 10 Allen, 387; *Lary v. Railroad*, 78 Ind. 323; 41 Am.



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Rep. 572; *Railroad v. Thompson*, 77 Ala. 448; 54 Am. Rep. 72; *Hounsell v. Smyth*, 7 C. B. (N. S.) 731; *Gautret v. Egerton*, L. R. 2 C. P. 371; *Wilkinson v. Fairrie*, 1 Hurlst. and C. 633; *Sullivan v. Waters*, 14 Irish, C. L. R. 460.

*Bates & May*, for the plaintiff.

Did the company owe any duty to the plaintiff? The plaintiff contends that he had such business at the station that he was entitled to demand of the company a suitable platform, properly lighted, or if not, that he had an implied license to visit the station; in other words, that he was not a trespasser there. The defendant was then engaged as a common carrier. It had in its train a postal car, furnished with all appliances for taking, sorting and delivering the U. S. mail. Postal clerks accompanied the car, and were in the exclusive use of same. See U. S. Rev. Laws, s. 4000; Instructions to R. R. Postal Clerks, ss. 720, 762.

It was held in *Pearce v. Langfit*, 101 Penn. St. 507, that it was a good delivery of a letter to a letter carrier; and in *Casco Bank v. Shaw*, 10 Am. Rep. 67 (Me.), that depositing in a letter box was sufficient to charge an endorser of a note with notice of dishonor.

A railway company is bound to keep a safe platform, and to keep it properly lighted at night. *Deering's Neg.* s. 85; *Whart. Neg.* s. 653; *Mayhew v. Mining Co.* 76 Me. 100.

In the following cases the company has been held liable to a hackman who went to a station to drum for passengers: *Tobin v. Railroad Company*, 59 Me. 183; to a driver of job wagon who went for a chest over a wharf owned by defendants but not occupied by them: *Campbell v. Sugar Company*, 62 Me. 552; to a custom house officer whose duty it was to watch for smugglers: *Low v. G. T. R. Co.* 72 Me. 313; to the husband who went to meet his wife: *McKone v. Michigan C. R. R.* 51 Mich. 601; s. c. 47 Am. Rep. 596; to mail agents on train: *Holton v. West. N. Y. R. R.* 15 N. Y. 444; 95 N. Y. 562; s. c. 47 Am. R. 75; to express agents: *Blair v.*

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*Erie R. R.* 66 N. Y. 313; to a person who went with an illiterate man to read a notice at station: *St. L. & L. M. R. R. Co. v. Fairbairn*, 23 Rep. 747 (Ark.)

But if the plaintiff was not a passenger, still he was rightfully at the station, and can maintain his action. *Moak*, Und. Torts, Rule 24; *Sweeney v. R. R. Co.* 10 Allen, 368; 99 Mass. 216; *Pierce v. Whitcomb*, 48 Vt. 127; *Snow v. R. R. Co.* 136 Mass. 552; s. c. 49 Am. Rep. 40; 72 Mass. 313; *Wendall v. Baxter*, 12 Gray, 494; *Stratton v. Staples*, 59 Me. 95; *Moak*, Und. Torts, p. 260; 129 Mass. 367.

The opinion of the court was delivered by

Ross, J. By the agreed case, November 2, 1885, the defendant was operating a railway from Portland, Maine, to Canada line, and had a station at Berlin Falls, New Hampshire. As such, it was carrying the mail on its mail trains for the United States government according to the laws of the United States, and pursuant to the conditions and regulations imposed by the post office department, at a fixed compensation. The plaintiff on that evening in attempting to go to its mail train while stopping at the station at Berlin Falls, for the purpose of mailing some letters, in the exercise of due and proper care, fell from an unguarded, and as he claims, insufficiently lighted platform, leading from the station to the train, and was injured. By the regulations of the post office department it was then the duty of postal clerks on trains carrying the mail to receive at the cars, among other things from the public, letters on which the postage had been prepaid, and there to sell stamps with which to prepay such postage. Sections 720, 762, Instructions to Railway Postal Clerks. Hence, as a part of the service which the defendant was performing for the government and for which it was receiving compensation from the government, it was under a duty to furnish the public a reasonably safe passage to and from its mail trains while stopping at its regular stations, for the purpose of purchasing stamps and mailing such letters. The plaintiff was a member

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of the public and was attempting to pass over the platform provided by the defendant to the mail train for the lawful purpose of mailing two letters. By accepting the carriage of the mail for the government the defendant became under the duty to furnish him a reasonably safe passage to its mail train for the purpose of mailing his letters. In attempting to pass over the platform to its mail train for this purpose the plaintiff was neither a trespasser, intruder, nor loafer, but was there to transact business which the defendant had undertaken to do with him for a compensation received from the government,—in fact was there at the invitation of the defendant to transact business which it had been hired to perform for and with him, by the government. The duty of the defendant to furnish the plaintiff a reasonably safe passage to its mail train to mail his letters was none the less binding or obligatory because the compensation received therefor came from the government rather than the plaintiff. A holds a regular passenger ticket over a railroad. The duty of the company operating the road to carry him safely is none the less binding, nor are his legal rights, if injured, in the least abridged because the ticket was paid for by the money of B rather than with his own money. The government derives a large part of its revenue with which it pays for the mail service by the sale of postage stamps to whomsoever of the public may desire to use that arm of its service. The money which the plaintiff had paid for the postage stamps upon the letters he was carrying, or which he would have paid the postal clerk for stamps to use upon the letters, was indirectly a payment to the defendant for the service which it was about to perform for the plaintiff in carrying the letters which he was about to post on the way towards their destination. But whether the plaintiff paid indirectly to the defendant for the service and accommodation which it was under a duty to furnish him, or the government paid therefor and gave it to the plaintiff, does not vary the defendant's duty to furnish him a reasonably safe passage to the mail car for the purpose of mailing his letters, nor are his legal rights

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thereby abated. Actionable negligence is failure in legal duty which occasions an injury to a party free from contributory negligence, or who has not failed in the discharge of his duty in the given circumstances. This is conceded by the counsel for the defendant. They have also conceded in the agreed case that the plaintiff exercised due and proper care on the occasion. They only contend that the defendant was under no legal duty to furnish the plaintiff a reasonably safe passage to the mail car for the purpose of mailing his letters, mainly because he was to pay the defendant nothing therefor directly. But, as we have already endeavored to show, that fact would not relieve the defendant from the duty, inasmuch as it was paid by the government for discharging that duty to the public; that is, to any person who had occasion to go to the mail car when stopping at regular stations to transact any lawful business with the servants of the government. These views would affirm the judgment of the County Court; but, in accordance with the stipulation of the parties, that judgment is reversed *pro forma* with costs to the plaintiff, and the cause remanded for trial.

## F. A. CUSHMAN v. W. A. SOMERS.

*Pleading. Covenant.*

In an action of covenant based on an indenture, where the declaration alleged that the plaintiff leased to the defendant the right to run a certain wood pulp grinder during the time a certain patent should be in force, and that the defendant was to pay as royalty twelve tons of pulp each year during the continuance of the agreement; that the pulp was to be poplar or spruce, and delivered at such places as might be designated by one R., provided that the freight did not exceed \$40 by the car-load; and that thirty-six tons of the royalty were unpaid; *Held*, on demurrer, (a) that the designation of the place of delivery was not an essential part of the consideration, and that a demurrer would not lie for want of an allegation that a place had been designated for delivery of the pulp; (b) that if R. failed to elect the kind of pulp, the selection fell on the defendant.

**COVENANT.** Heard on general and special demurrer to the declaration, December Term, 1887, TAFT, J., presiding. Judgment that the declaration is sufficient, overruling the demurrer.

The defendant prayed oyer of the contract between W. A. Russell and Rollins C. Jones, the assignment of the contract from Jones to plaintiff, and the contract between plaintiff and defendant referred to in declaration. The same were all filed and made a part of case.

Declaration: "In a plea of covenant broken for that, whereas, heretofore, viz.: to wit, the 23d day of August, A. D. 1880, at Barnet aforesaid, by a certain indenture then and there made between the said plaintiff of one part and the said Somers of the other part; one part of which said indenture, sealed with the seal of the said Somers, the plaintiff now brings here into court, the date whereof is the day and year aforesaid, the plaintiff did demise, lease and let unto the said Somers and his assigns the right to run a certain wood pulp grinder in said town of Barnet, to have and to hold the said

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right to run the same unto the said Somers and his assigns from, to wit, the 23d day of August, A. D. 1880, to the full end and term of years during which a certain patent, called the Veolter Patent, upon a certain wood pulp grinder, called the Veolter Machine, should be in force, and fully to be complete and ended, yielding and paying therefor, beginning on the 1st day of December, A. D. 1880, twelve tons of dry pulp each and every year thereafter during the continuance of said agreement, at the rate of two tons for every two months, as royalty on said machine (said pulp to be delivered in car-loads at such places as might be designated by one William A. Russell, of Lawrence, in the State of Massachusetts, provided that the freight thereon should not exceed forty dollars by the car-load). And the said Somers did thereby, for himself and his assigns, covenant and agree with the plaintiff that he, the said Somers, and his assigns, would well and truly pay to the said plaintiff the said yearly rent or royalty in the manner above set forth. And the plaintiff saith that after the making of the said indenture, and during the said term thereby granted, a large amount of the pulp, viz., thirty-six tons of the royalty aforesaid, for three years of the said term then elapsed became, and was, and still is, in arrear and unpaid to the plaintiff, contrary to the tenor and effect of the said indenture, and of the said covenant of the said Somers, by him in that behalf, so made as aforesaid, to wit, at Barnet aforesaid. And so the plaintiff says that the said Somers hath not kept his said covenant so made with the plaintiff as aforesaid, although often requested so to do, but hath hitherto refused, and still refuses so to do."

Special Demurrer: First—That the declaration does not allege that the said W. A. Russell, named in plaintiff's declaration, ever elected whether he should be furnished with poplar or spruce pulp; nor is it alleged that defendant refused to furnish pulp after said Russell's election.

Second—It is not alleged that the said Russell ever designated the point or points to which the pulp was to be shipped;

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nor that the price of freight (if points were designated) was within the \$40 limit; nor that the defendant had refused to deliver pulp upon request, for shipment to \$40 shipping points.

The following was a part of the contract between Jones and Russell: "In consideration and as the condition of the enjoyment of the said license the said Jones or his assigns shall pay to the said Russell or his assigns, as royalty, twenty-four tons dry weight yearly of merchantable pulp, spruce or poplar, as he or they may elect, to begin July 1, 1878, and to be delivered, one car-load of four tons once in two months thereafter at any point as the said Russell may designate where the freight will not exceed \$40 per car-load to the place of delivery."

The other facts are sufficiently stated in the opinion of the court.

*Bates & May*, for the defendant.

The writings clearly show that the defendant was bound to deliver one-half of the quantity of pulp required by the original contract with Russell to order of Russell. The defendant did not have the right to select the kind of pulp to be delivered. The selection was reserved to Russell and his assigns. Gould Pl. pp. 66, 162, 408, ss. 32, 45; 2 Benj. Sales, s. 1018.

The rule of law is well settled that where an article to be furnished is a heavy one, the seller is under no obligation to make delivery at any place other than at his manufactory unless there is an express place named; and if the buyer has any duty to perform in reference to the article he must allege and prove that he has fully performed the same. 13 Me. 265; 53 Me. 52; 67 Me. 295.

*Ide & Stafford*, for the plaintiff.

It is no cause of demurrer that the declaration does not allege that Russell ever elected whether he should be furnished with poplar or spruce pulp. *Patchin v. Swift*, 21 Vt. 292;

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*Mayer v. Dwinell*, 29 Vt. 298; *Bennett v. Bennett*, 4 N. E. Rept. 501; *Russell v. Ormsbee*, 10 Vt. 274; *Peck v. Hubbard*, 11 Vt. 612; *Welch v. Bradley*, 41 Vt. 308; *Townsend v. Wells*, 3 Day, 327.

The fact that he did not elect does not relieve the defendant from payment. It was defendant's duty to elect, and so discharge himself. *Taylor v. Gallup*, 8 Vt. 340. Nor is it any cause of demurrer that there was no allegation that Russell ever designated the point to which the pulp should be shipped, and that the freight was within the \$40 limit. *Peck v. Hubbard*, *supra*.

The opinion of the court was delivered by

TYLER, J. It appears that Jones assigned all his interest in the contract with Russell to the plaintiff, who thereupon assumed all the duties and obligations that it imposed upon Jones. The plaintiff then sold to the defendant a half interest in the contract, namely, the right to use one machine in the town of Barnet, the defendant covenanting with the plaintiff to pay him therefor one half the number of tons of dry pulp required in the articles of agreement between Russell and Jones, payment to commence from December 1, 1880, and to be made at such times and upon such terms as that agreement specifies. The Russell-Jones contract is made a part of the contract between these parties to the extent, at least, of making the place of delivery dependent on Russell's designation.

The demurrer raises the question, whether upon the averment in the declaration that the pulp was to be delivered in car-loads at such places as Russell might designate, such designation was a condition precedent to the plaintiff's right of recovery. This should not be determined by technical and artificial rules; but it should be ascertained by a fair construction of the contracts, whether it was the intention of the parties that the defendant's liability to pay for the use of the machine should depend on Russell's designation of a place of delivery of the pulp.



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It can hardly be claimed that the defendant did not become indebted to the plaintiff for the use of the machine to the amount of twelve tons of pulp a year during the term of such use. The declaration avers an indebtedness, and the demurrer admits it. A designation of place of delivery by Russell was not an essential part of the consideration of the contract. It was a mere privilege reserved to him, and upon his omission to exercise it within a reasonable time it became the duty of the defendant, in order to discharge himself from liability, to designate a suitable place of delivery and then to deliver the pulp within the time specified, and notify the plaintiff thereof. As was said by the court in *Welsh v. Bradley*, 41 Vt. 308: "If this was not so, all remedy upon the obligation might be lost for ever, and in respect to a claim or debt unquestionably due." This is in effect the law as laid down in *Russell v. Ormsbee*, 10 Vt. 274, and *Peck v. Hubbard*, 11 Vt. 612.

As to the election of the kind of pulp, it makes no difference whether it was in Russell or the defendant. If in Russell, as the defendant claims, it was waived by non-exercise, and the election fell to defendant.

Judgment affirmed and cause remanded.

## ORLEANS COUNTY, MAY TERM, 1888.

PRESENT : ROSS, ROWELL, TAFT AND TYLER, JJ.

## STATE v. WILLIS WAKEFIELD.

*Criminal Law. Justice of Peace. Jurisdiction.*

1. A former conviction rendered by a justice of the peace against one for intoxication on his own complaint is not a bar to a prosecution previously instituted by the state's attorney for the same offense, although the fine is determined by the statute. A formal complaint was necessary to confer jurisdiction on the magistrate.
2. Jurisdiction defined.

COMPLAINT charging intoxication. Heard on complaint, plea, replication and demurrer thereto, September Term, 1887, POWERS, J., presiding. Judgment that the replication is sufficient, overruling the demurrer. The case appears in the opinion of the court.

*Dickerman & Young*, for the respondent.

The justice of the peace had jurisdiction of the subject-matter when he imposed the fine on the respondent. Section 3812, R. L., provides that a person shall pay a fine of \$5.00 on conviction of intoxication. Section 1666 confers jurisdiction on a justice in criminal actions when the punishment is by fine not exceeding \$10. Jurisdiction of the subject-matter is power to adjudge concerning the general questions involved. One court has jurisdiction in criminal cases; another in civil cases; each in its sphere has jurisdiction of the subject-matter. It is the power to act upon the general, and, so to speak, the abstract question, and to determine and adjudge whether the particular facts presented call for the exercise of the abstract power. *Hunt v. Hunt*, 72 N. Y. 217. The subject-matter in

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this case is the offense of being found intoxicated. *Gornvett v. Burdwell*, 1 Lord Raym, 454; *Perry v. Morse*, 57 Vt. 509; *Lange v. Benedict*, 73 N. Y. 28; *Borst v. Corey*, 15 N. Y. 509. A respondent can give jurisdiction voluntarily. *Hoxie v. Wright*, 2 Vt. 263; *Hall v. Williams*, 6 Pick. 232; *Wright v. Anderson*, 130 Mass. 149; cases, *supra*; *Stone v. Van Curren*, 2 Vt. 115.

There can be no fraud in one's procuring a conviction of himself in a case where the amount of the fine is fixed by statute; and in such case a former conviction is a bar. *Hamilton, qui tam, v. Williams*, 1 Tyler, 15; 3 Phil. Ev. (C. & H. Notes) p. 837, note 589.

*F. E. Alfred, State's Attorney*, for the State.

The crime of which the respondent is charged, is a creature of the statute. The duties and powers of a justice of the peace are prescribed by the statute. State's attorneys, town grand jurors and certain police officers are complaining officers of crimes to be heard before justices of the peace. R. L. ss. 1618, 1622. When other than an informing officer becomes a prosecutor, his name must be entered at the foot of the complaint, and he is held to pay costs, etc., R. L. s. 1749. He must enter into a recognizance before a warrant issues. R. L. s. 1750. Section 1667 provides that no justice shall issue a warrant, in such a case, to apprehend a person, until he has taken security.

The justice must make a minute, on the complaint, of day, month and year, that same was exhibited. Sec. 1719. Unless this minute is made, it will be fatal. *Slate v. Perkins*, 58 Vt. 722.

By the constitution, warrants without oath or affirmation ought not to be granted. Art. 11, Chap. 1. The provisions of this part of the constitution were fully adopted by the court in *State v. J. H.*, 1 Tyler, 444; *State Treasurer v. Rice & Burgess*, 11 Vt. 339; *Gill v. Parker*, 31 Vt. 610; *Campbell v. Thompson*, 16 Me. 120; *State v. Soragan*, 40 Vt. 450.

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The statute must be followed in all criminal prosecutions, or they are wholly void.

It is essential that the court rendering judgment in a cause should have jurisdiction as well of the process as the party and subject-matter. ROYCE, J., *Aiken v. Richardson*, 15 Vt. 500. To the same effect is *Mussey v. Howard*, 42 Vt. 23.

Without jurisdiction, the court has no power. Herm. Est. ss. 69, 73; *Robertson v. State, Ex rel. Smith* (Ind.) 7 West. Rep. 481. If the respondent had been committed by Connal, the justice, the commitment would have been illegal. *Vaughn v. Congdon*, 56 Vt. 119. Again, if the proceedings before Connal were regular, the respondent would be entitled to one-fourth of the fine. The respondent in pleading his former conviction, should have alleged that every requirement of the statute had been complied with. It should appear that the justice had jurisdiction. *Piper v. Pierson*, 2 Gray, 120; *State v. Reed*, 26 Conn. 208; *Commonwealth v. Alderman*, 4 Mass. 477; *Commonwealth v. Bascom*, 111 Mass. 404; *State v. Little*, 1st N. H. 257; *Moore v. State*, 71 Ala. 307; Cr. Law, Mag. 909; *State v. Calvin*, 11 Humph. 599; S. C. 54 Am. Dec. 57; *State v. Simpson*, 28 Minn. 66; S. C. 41 Am. Rep. 269.

The opinion of the court was delivered by

TYLER, J. The complaint is for intoxication. Plea, that the respondent, on the 22d day of August, 1887, at Newport, went before Peter Connal, a justice of the peace, within and for the County of Orleans, and entered a complaint against himself for the offense charged in this complaint and requested the justice to fine him therefor; whereupon the justice heard the complaint and the confession of guilt, adjudged the respondent guilty and sentenced him to pay a fine of five dollars and costs, which he paid. It is claimed that the judgment and sentence are a bar to this prosecution. Replication, that this complaint had previously, on the same day, been preferred by the state's attorney, and the warrant issued thereon, returnable

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before another justice, and that the respondent went before Justice Connal and procured his own conviction for the sole purpose of avoiding the effect of this complaint. The State claims that the judgment and sentence thus obtained were extrajudicial and are not a bar to this complaint. The respondent demurs generally. The only question is whether or not the replication presents sufficient matter in avoidance of the plea.

Art. 11 of Chap. 1, of the Constitution of this State says that warrants, without oath or affirmation first made, affording sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to sieze any person or persons, his, her or their property, not particularly described, ought not to be granted.

State's attorneys, town grand jurors and certain designated police officers in incorporated villages are made by our statutes informing officers of offences committed within their jurisdiction. R. L. ss. 1618, 1619, 1622. Sec. 1749 provides that when any person, other than such informing officers, becomes a prosecutor, he shall enter his name and place of residence at the foot of the complaint, information, or indictment, in which he becomes a prosecutor, and shall be liable to pay costs and may receive costs if the respondent is convicted. Sec. 1667 provides that no warrant shall issue, except on complaint of an informing officer, until the magistrate has taken a recognizance for costs and made a minute thereof as in civil cases; and sec. 1719 requires that he shall, at the time, make a minute on the complaint, under his official signature, of the day, month and year when the same was exhibited to him.

It was held in *State v. Soragan*, 40 Vt. 450, that it is indispensable that the complaint show on its face that it is presented by one having proper authority; that the authority of the informing officer is fundamental, as the complaint is the basis of the conviction. In *State v. Perkins*, 58 Vt. 722, it was held that the failure of a magistrate to make a minute such as the statute requires, is a fatal defect and not amendable.

The replication alleges and the demurrer admits that none

of the foregoing constitutional and statutory requirements were complied with. There is no provision in our statute by which a magistrate can of his own volition, on request of an offender, set in motion the machinery of the law. Though he may have jurisdiction of the person and the subject-matter, he cannot have jurisdiction of the process, except on the information of an officer thereto authorized by statute or by a private prosecutor under the statutory requirements.

Jurisdiction is defined to be the authority by which judicial officers take cognizance of and decide cases; power to hear and determine a cause; the right of a judge to pronounce a sentence of the law on a case or issue before him, acquired through due process of law. *Bouvier's Law Dict.*; *Perry v. Morse*, 57 Vt. 509. Jurisdiction, in order to be complete, must be of the process, the person and the subject-matter. *Vaughn v. Congdon*, 56 Vt. 111; *Perry v. Morse*, and cases cited.

The plea does not allege that the former conviction was pursuant to the requirements of the statute and therefore within the jurisdiction and power of the justice to make; and clearly the respondent could not confer jurisdiction by waiving these requirements.

It is conceded by respondent's counsel that in case of an offense where the fine is not fixed, as in an assault and battery, a former conviction would not be a bar, because an offender might have himself fined for a much smaller sum than he deserved and plead his conviction in bar of a complaint by an informing officer, and so defeat the law. This objection does not exist where the fine is fixed, and yet, if this offender could complain of himself he could not only avoid payment of the costs already made on this complaint and warrant; but he could claim one-fourth of his fine under sec. 3855, R. L., and escape full punishment, thus accomplishing the purpose for which, as admitted by the pleadings, this respondent procured his conviction; namely, to avoid the effect of the complaint.

But it is only necessary to decide that a formal complaint is

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required, in order to confer jurisdiction, and that for want thereof in this case the action of justice Connell was not *res adjudicata*, as against the State. In *re Emma Pierce*, 46 Vt. 374, and in *Cain v. Valiquette*, 56 Vt. 78, the requirement of a formal complaint is recognized. In the former case it is said that: "The prosecution \* \* \* must be by complaint and warrant, the same as for an unlawful sale of liquor;" and in the latter, that, \* \* \* "formal proceedings by way of complaint, information or indictment are necessary."

A paragraph from the opinion of the court in *State v. Colvin*, 11 Humph. 599, though in a case where the fine was not fixed by law, is very pertinent: "While the statute was designed to furnish a more easy, expeditious and less expensive mode for the punishment of ordinary misdemeanors, it was certainly never intended by its authors to abate, in the slightest degree, the rigor of the principles of criminal jurisprudence applicable to such cases, nor to impair the efficiency of their administration, much less to open a door to fraudulent and collusive evasions of the law. To make a conviction under this statute a bar to a prosecution in the circuit court, it must appear that the case was properly within the authority and jurisdiction conferred upon the justice; that the proceedings were fairly and legally conducted, and that all the material requirements of the statute were complied with, not colorably or collusively, but substantially and in good faith."

"The offender cannot voluntarily appear before the justice and charge himself, and therefore it was held in *State v. Atkinson*, 9 Humph. 677, that the plea of the defendant in that case was bad, for want of the averment that he had been brought before the justice by process regularly issued against him. Neither can he be permitted, by his own procurement, or by collusion with others, to have himself brought before the justice, even under cover of legal process. To tolerate this would be mere mockery of the administration of the law."

Demurrer overruled, replication adjudged sufficient and cause remanded,

## NOAH TITTEMORE AND WIFE v. JOHN LABOUNTY.

*Replevin. Gift. Executor and Administrator.*

1. A right to the possession of property is sufficient to maintain replevin against one who has neither title nor such right; thus, where either the plaintiff's wife was the owner, or her father's estate was, whose administrator told the plaintiff husband to take it for his wife, they can maintain replevin against one without title or right of possession.
2. And in such case, it is not necessary to decide whether there was a valid gift of the property from the father.

REPLEVIN for a colt. Heard by the court, September Term, 1887, VEAZEY, J., presiding.

Judgment for the defendant for a return of the property. The plaintiffs claimed the colt was the property of the plaintiff wife, who was the daughter of Alpheus Harding, who deceased in 1884. The said plaintiff husband testified that said Alpheus gave the colt to his wife. The court found: There was other evidence, not objected to and undisputed, tending to show a gift of the colt by the said Alpheus to his said daughter, but without any delivery of the same to her; upon this latter evidence alone, the court find the fact of a gift, without delivery of possession, and that it was understood in the family of the said Alpheus and by the brothers of the said Florence E. this colt was given to said Florence and belonged to her.

In the administration of the estate of the said Alpheus, it became necessary to sell the personal property of the estate, and when the administrator was making up a list of the personal property for sale, said Frank Harding, a brother of Florence, offered to take the colt and keep it for her.

The administrator understood that the colt had been given to said Florence as aforesaid, and thought if the colt was hers he did not want anything to do with it, and so let Frank take it upon his offer to do so.



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He gave no permission to Frank to sell the colt, and did not expect he would sell it, but that he would keep it for his sister, if it should turn out that she had a legal right to have it.

Frank afterwards sold the colt to the father of the defendant, and the father subsequently sold it to the defendant.

When the father bought it he had been informed that the colt belonged to said Florence, and so told Frank Harding, but Frank denied this, and said the colt had always been his.

*Crane & Alfred*, for the plaintiffs.

*Edwards & Burke*, for the defendant.

The opinion of the court was delivered by

Ross, J. On the facts found, Frank Harding had no authority to sell the colt to the defendant's father. Hence, the father obtained no title to the colt by the purchase and conveyed none by his sale to the defendant. The defendant, therefore, held the colt at the time this suit was brought, without title or right to its possession.

The title to the colt and right to its possession at the time were either in the plaintiff wife or in the estate of her father, Alpheus Harding. For the purpose of this suit it is unimportant to determine in which the title and right of possession existed. If they were in the estate, the administrator of the estate authorized the plaintiff husband to take possession of the colt for and in the name of the plaintiff wife. Hence, the plaintiff wife had the right to the possession of the colt, if the title was then in the estate. Right to the possession of the colt against the defendant was all that the plaintiffs were obliged to show to entitle them to maintain the suit. 30 Vt. 399; 36 Vt. 220; 41 Vt. 6.

The only contention made by the defendant's counsel in their brief is that, inasmuch as Alpheus Harding never delivered the colt to the plaintiff, Florence E., the gift remained

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executory and inoperative to convey the title. It is elementary and abundantly supported by the authorities cited by the defendant's counsel, that to create a valide gift of personal property, *inter vivos*, the possession of the property must be transferred to the donée in person, or to some one other than the donor, for the donee, and that the donor's statement, however clear and strong, that he gives the property, legally amounts to no more than a promise to give, wholly insufficient to transfer the title from the donor to the donee. But, as we have already said, the determination of this question is immaterial; for if the title still remained in the estate, the administrator had authorized the plaintiff husband to take possession of the colt for and in the name of his wife, which is ample to entitle the plaintiffs to maintain the suit against the defendant who has neither title nor right to possession. The other questions raised on the trial have not been insisted upon. The judgment of the County Court is reversed, and judgment rendered for the plaintiff for one cent damages and their costs.

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JOHN P. LINDSEY v. PERSIS BREWER, THEOPHILUS GROUT, AND O. H. AUSTIN, JUDGE  
OF PROBATE FOR THE DISTRICT  
OF ORLEANS.

*Homestead. Court of Chancery, Jurisdiction of. R. L. s. 1908. Pleading. Married Woman.*

1. The Court of Chancery has jurisdiction in partition cases involving the homestead, when its severance would greatly depreciate the value of the residue of the premises, although proceedings are pending in the Probate Court to set out the homestead; and that there may be an equality of partition, the court will determine in its discretion the manner of granting relief, either in accordance with statute,—R. L. ss. 1908-9,—or in ordering the payment of money by one to the other owner.
2. A bill brought under section 1908, R. L., for relief, where a severance of the homestead would greatly depreciate the value of the residue of the premises, is defective, if it does not allege that the value of the property exceeds \$1,000; but a bill with such defect is amendable.
3. The fact that a married woman has deserted her husband and is living separate from him at the time of his decease, does not deprive her of a homestead in his premises.

**BILL IN CHANCERY.** Heard on bill and demurrer thereto, February Term, 1888, POWERS, Chancellor. Decree *pro forma* that the bill be dismissed, sustaining the demurrer. The bill alleged in part: "That the said Persis Brewer now claims a homestead in said premises, and has taken measures to have a homestead set out to her by metes and bounds; but your petitioner claims and insists that the said Persis Brewer has no homestead in said premises, but if the court should determine that the said Persis has a homestead in said premises, then your petitioner insists that a severance of said homestead would greatly depreciate the value of the residue of the premises, and would be of great inconvenience to the parties interested in the residue of the homestead."

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And your petitioner further says : " That commissioners were appointed by the Probate Court to set out a homestead in said premises as above stated, and in pursuance of their appointment, on the 3d day of August, 1877, repaired to said premises and set out a pretended homestead in said premises, as by the report of said commissioners on file in the office of said Probate Court."

An injunction was issued against the judge of probate enjoining him from recording the report of said commissioners. The other facts are sufficiently stated in the opinion of the court.

*Crane & Alfred and J. L. Edwards*, for the petitioner.

The petitioner has no adequate remedy at law, as he cannot take an appeal from the decision of the Probate Court. *Hemenway v. Corey*, 16 Vt. 225, is quite analagous to this case. *Gilbert v. Howe*, 47 Vt. 402; *Swift v. Kenison*, 39 Vt. 473; *Downing v. Foster*, 9 Mass. 386.

The statute contemplates just such a proceeding as this. R. L. ss. 1908-9. It is manifest that a court of equity has jurisdiction of the matter in this bill. In *Chaplin v. Sawyer*, 35 Vt. 286, ALDIS, J., says: " It is also claimed that the Probate Court should adjudge that there was a homestead before the Court of Chancery can take cognizance of it, either to sell or assign under the act. It would be singular if the legislature had made the jurisdiction of chancery in the matter to depend on the decision of the Probate Court. There is nothing in the words of the act to show such an intent."

The statute is applicable for farm premises. *Palmer v. Palmer*, 50 Vt. 310. But independent of the statute, equity has jurisdiction. *Thompson, Homesteads*, s. 630; *Sulloway v. Brown*, 94 Mass. 36; *Swan v. Stevens*, 99 Mass. 9; *Sisson Tate*, 114 Mass. 501; *Lamb v. Mason*, 50 Vt. 345. The parties being tenants in common, the subject-matter is clearly within the province of a court of equity. 1 Story, Eq. Jur. ss. 649, 65, 655; *Barney v. Leeds*, 54 N. H. 128, 253, 279.

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Equity has jurisdiction in cases involving the partition of real estate. *Tucker v. Keniston*, 47 N. H. 270; *Horn v. Tufts*, 39 N. H. 485; *Atkinson v. Atkinson*, 37 N. H. 437; *Thompson, Homesteads*, ss. 479, 583, 680; *Gunnison v. Twitchell*, 38 N. H. 65; *Whitten v. Whitten*, 36 N. H. 326; *Norris v. Moulton*, 34 N. H. 399. An injunction was properly granted. 2 Story, Eq. Jur. s. 875. Persis Brewer having abandoned her husband, has forfeited all right to a homestead. *Thompson, Homesteads*, s. 74; 8 Tex. 312; 45 Tex. 559, 588.

*C. A. Prouty* and *Theophilous Grout*, for the defendants.

Section 1914, R. L., does not apply; for this is not an application to the Probate Court; nor does section 1908; for it is not alleged that the premises exceed \$1,000 in value. The Probate Court has original and exclusive jurisdiction; and a Court of Chancery has no authority to enjoin its officers. Pom. Eq. Jur. s. 1360.

But if the court has jurisdiction in this case, relief should not be granted. Parties are never restrained from proceeding in a suit at law when substantial justice can be done in that action. Pom. Eq. Jur. s. 1361. If the orator had a right to appeal from the decision of the Probate Court, he has no standing in this court. *Central Vermont R. R. Co. v. Royalton*, 58 Vt. 234. He had a right to appeal. R. L. s. 2270; *Byram v. Byram*, 27 Vt. 295. The orator has a direct interest in the decree of the Probate Court, and this gives such right.

The defendant Persis Brewer claims a homestead in these premises. She applies to the Probate Court, the only court in this State having jurisdiction of such matters, to set out that homestead. The Probate Court appoints commissioners under the statute. These commissioners make their report to the court, and the orator comes into that court and objects to the acceptance of that report. The Probate Court hears him and decides against him. Now what is there in all this that gives the Court of Chancery jurisdiction? There is no allega-

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tion that the defendant has been guilty of any fraud in the matter. There is no pretense that the orator was by any improper practice deprived of the right to make a full showing before the Probate Court, or that that court refused to hear him, or that he asked for and was denied the right of an appeal; or that he had any defence of such an equitable nature that it could not be gone into before that court.

The opinion of the court was delivered by

Taft, J. The question presented in this case is whether equity has jurisdiction of the matters alleged in the bill. We think that under our statute, Mrs. Brewer, upon the death of her husband, took a homestead in the premises in question, although it is alleged that she had deserted her husband and was living separate from him at the time of his decease. Proceedings are now pending in the Probate Court to set out the homestead, and this bill is brought setting forth that a severance of said homestead would greatly depreciate the value of the residue of the premises, and would be of great inconvenience to the parties interested in the residue of the homestead, and render them of little value; praying that the proceedings in the Probate Court be set aside and held for naught, and for further relief. The Probate Court has exclusive jurisdiction of the settlement of estates; and under R. L. s. 1914, has authority to order a homestead sold when it appears that a severance of it would greatly depreciate the value of the residue of the premises, and can so order upon the application of either the owner of the homestead or the owner of the residue.

Section 1908, R. L., provides that in case the dwelling-house, outbuildings and land not exceeding one-half acre in connection therewith, exceed in value one thousand dollars, and severance of the homestead would greatly depreciate the value of the residue, either party may apply to the Court of Chancery for relief; and the succeeding section, 1909, empowers the court to order a transfer of the interest of one party

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to the other, or a sale of the property. It was held in *Palmer v. Palmer*, 50 Vt. 310, that the statute applied to cases where the land in connection with the homestead exceeded half an acre. The bill is defective under section 1908, in that it does not allege the value of the property named to exceed one thousand dollars; so that that statute gives the orator no aid unless the bill is amended in that respect. The orator insists that he is entitled to relief, that a court of equity has jurisdiction, without the aid of any statute.

In cases of homesteads, before they are set out, the parties owning the premises including the homestead, are not, strictly speaking, tenants in common of the premises, although they are often termed such. The interest of the widow does not extend to any part of the real estate beyond that portion of the dwelling, out-buildings and land in connection therewith to the value of five hundred dollars, and the owner of the residue has no interest in the homestead itself. The estates are distinct from each other, but the boundaries are not known. The homestead is to be carved out of the entire estate by such boundaries as under the law may be determined by the commissioners. Were the parties tenants in common a partition might be had under R. L. chap. 70, relating to the partition of real estate; but we do not regard them as tenants in common, and that chapter is not applicable. A party owning the residue of the estate in a case like the one at bar, *i. e.*, one not within the provisions of R. L. sec. 1908, must either submit to a sale of the premises under sec. 1914, or to a division of the estate under sec. 1907, and the character, condition and situation of the property may be such that a division of the estate cannot but be an unequal one and result in ruin to the owner of the residue, unless equity can seize hold of the matter and compel an equal division. Although the parties are not tenants in common, the property is such that a partition must be made of it between the respective owners, and since the time of Queen Elizabeth the partition of estates has been held a proper subject of equity jurisprudence. The doctrine

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is well established in England and in this country by a long series of decisions, and it has been found of great public convenience, and as the learned Kent says, in his Commentaries, Vol. 4, page 365, "if it should appear that equal partition cannot be made without prejudice to the rights and interests of some of the parties, the court may decree compensation to be made by one party to the other for equality of partition"; and that this is the rule independent of any statute provision. Jurisdiction in the partition of estates was taken by courts of equity, although at the time, the law courts had concurrent jurisdiction, and the equity courts took jurisdiction after partition had been effected at law, where the partition was unequal or had to be corrected. 1 Spence, Equit. Juris. of the Court of Ch. 654. The reasons for such jurisdiction are well set forth in Bispham's Equity, sections 487-93 and note 3 to section 489. We are aware of no text book upon equity jurisprudence that does not admit that the matter of partition is one of the subjects of equity jurisdiction. This case is one of partition. The law courts cannot effect it with equality. Equity can. In what manner the Court of Chancery shall grant the orator relief is for that court to determine. In analogy to the statute, we think it may be in the manner provided by Rev. Laws, sections 1908-9, in respect to the estates mentioned in those sections, or by the payment of a sum by one to the other owner that will make the partition equal. We hold that the court has power to make the partition an equal one, and that, having the power, it is left to exercise it in its discretion. The demurrer should have been overruled.

Decree reversed and cause remanded.



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GOFF AND ANGUS v. GEO. S. AND LUCY C.  
ROBINSON, ADM'RS OF THE ESTATE  
OF LUCIUS ROBINSON.

*Executor and Administrators. Jurisdiction. Statute of  
Limitations. R. L. ss. 973, 2125.*

1. The jurisdiction of the Probate Court is exclusive in regard to all claims of an absolute or legal nature, when it has been once invoked for the settlement of an estate, and commissioners have been appointed thereon; thus, when a claim had been presented to commissioners by one of two joint contractors and there was an appeal, and it was ultimately decided that the suit could not be maintained on the ground of non-joinder of parties; *Held*, that the County Court had no jurisdiction of the same cause of action brought directly to that court against the administrators and after the commission on the estate had been closed.
2. Section 973, Rev. Laws, which provides that when a writ fails for matter of form, etc., the plaintiff may commence a new action for the same cause within one year, has no application to the subject of jurisdiction, but is simply a modification of the Statute of Limitations.
3. The court has no authority to allow an amendment to pleadings when it has no jurisdiction of the cause of action.

ASSUMPSIT commenced, returnable, and entered at the February Term, 1888, of the Orleans County Court. Motion to amend the declaration. While the motion was pending the defendants filed a plea to the jurisdiction of the County Court. The court adjudged, as a matter of discretion, that it had no right to allow the plaintiffs to amend their declaration, and solely as a matter of law denied the motion to amend. Thereupon the plaintiffs, by special leave of the court, filed a replication to the plea, and the defendants demurred to the replication. The court sustained the demurrer, adjudged the replication insufficient, and rendered judgment that the suit abate for want of jurisdiction of the court. The facts as to the cause of action are sufficiently stated in the opinion of the

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court and in *Angus v. Robinson*, 59 Vt. 585. The plaintiffs' replication to the defendants' plea was as follows :

“ And now come the plaintiffs, Goff and Angus, in the above entitled suit and as to the plea to the jurisdiction of this court by the defendants above pleaded say : That this court ought not to be ousted of their jurisdiction in this cause, because the plaintiffs say that commissioners were appointed on the estate of said Lucius Robinson, deceased, to receive, examine and adjust the demands and claims of all persons against said estate, as alleged in said plea, and that more than two years and six months from the date of the appointment of said commissioners had elapsed at the commencement of this suit ; and the plaintiffs aver that within the time limited for the presentation of claims and demands against said estate to said commissioners for examination and allowance the said plaintiff, William Angus, then and now the sole owner of the claim and cause of action and damages set forth in the plaintiffs' said declaration, and sought to be recovered in this action, presented in his own name to said commissioners for allowance the identical claim and cause of action against said deceased and his estate above set forth and declared upon it in the plaintiffs' said declaration, which declaration is referred to and made a part of this replication ; and the plaintiffs aver that such proceedings were had before said commissioners that the said claim and cause of action so presented to them by said plaintiff Angus was disallowed by said commissioners, and their report disallowing the same was duly returned to said Probate Court, and within twenty days after the return of said report of said commissioners the said plaintiff, Angus, took his appeal from the decision and judgment of said commissioners disallowing said claim to the then next stated term of the Orleans County Court in due form of law, and filed his declaration in said Probate Court, and declared in said declaration on and for the identical claim and cause of action above set forth in the plaintiffs' said declaration in this suit ; and said appeal was duly allowed by said Probate Court, and the same was duly entered in the said Orleans County Court at the then next stated session thereof ; to wit, the session thereof begun and holden on the first Wednesday next after the first Tuesday of September, A. D. 1883, and such proceedings were had in said appealed cause in said County Court ; that the same were continued from term to term until

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the session thereof begun and holden on; to wit, the first Wednesday next after the first Tuesday of September, A. D. 1884, at which last term the defendants demur to the declaration of the said plaintiff Angus in said appealed cause for the non-joinder of said plaintiff, Edward H. Goff, as co-plaintiff in said appealed cause, and upon joinder in demurrer said County Court sustained said demurrer, and adjudged said declaration in said appeal cause insufficient by reason of the non-joinder of said Edward H. Goff as co-plaintiff as aforesaid, and thereupon said Angus alleged exceptions to said judgment, and said exceptions were allowed by said County Court, and said appealed cause was thereupon duly passed to the next stated session of the Orleans County Supreme Court, to be holden on the fourth Tuesday of May, A. D. 1885, and at said session of said Supreme Court said cause was duly entered therein, and such proceedings were had therein that said cause was continued to the session of said Supreme Court, begun and holden on the fourth Tuesday of May, A. D. 1886, and at the last named Term of said Supreme Court said cause was heard, and the judgment of the said County Court on said demurrer was affirmed, and said cause was thereupon remanded to said County Court, and was duly entered in said County Court, and such proceedings were had in said County Court that said cause was continued from term to term of said County Court until the session thereof begun and holden on the first Wednesday next after the first Tuesday of September, A. D. 1887, at which last named term said cause was discontinued by said plaintiff, Angus, solely by reason of the non-joinder of the said plaintiff, Edward H. Goff, as co-plaintiff in said appealed cause, and the aforesaid judgment of said Supreme Court in the premises as aforesaid; and the plaintiffs aver that the power and authority of said commissioners to receive, examine and adjust the claim and cause of action set forth in the plaintiffs' said declaration had expired and ceased by operation of law long before the session of said County Court last aforesaid, and long before the commencement of this suit; and that at the commencement of this suit said commissioners and said Probate Court had no jurisdiction, and now have no power or jurisdiction to examine, adjust and allow the claim and cause of action above set forth in said plaintiffs' said declaration, or in any manner to pass upon the same; and these plaintiffs aver that said original action for the identical claim and cause of action set forth in the plaintiffs' declaration

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commenced and prosecuted by the plaintiff, William Angus, in his own name, as aforesaid, was defeated solely for matter of form; to wit, for the non-joinder of the plaintiff, Edward H. Goff, as co-plaintiff with said plaintiff Angus in said original suit, and this suit is commenced within one year after the determination of said original suit, according to the statute in such case made and provided; and the plaintiffs aver that the said cause of action is within the jurisdiction of this honorable court, and not within the jurisdiction of said commissioners and said Probate Court.

“And the plaintiffs aver that the defendants have never rendered and settled their account as administrators as aforesaid, in said Probate Court, and that the estate of the said Lucius Robinson, deceased, has never been distributed by said Probate Court or by said defendants as administrators as aforesaid, and that there still remains in the hands of the said defendants, as administrators as aforesaid, assets of said estate sufficient to pay all claims, debts and demands against said deceased and his estate, all of which these plaintiffs are ready to verify; wherefore they pray judgment if the said defendants ought to be admitted or received to their said plea to the jurisdiction of this court in this cause, and that said defendants may answer over to said declaration and suit and for plaintiffs’ costs.”

*Crane & Alfred*, for the plaintiffs.

The court below had the discretionary power to allow the amendment to plaintiffs’ declaration embodied in their motion to amend filed before the filing of the plea to the jurisdiction.

The writ and declaration disclose a case within the general jurisdiction of the County Court. The proposed amendment did not change the form or cause of action, or the parties to the suit. R. L. s. 907; *Austin v. Dills*, 1 Tyler, 312; *Winn v. Averill*, 24 Vt. 285; *Dana v. McClure*, 39 Vt. 197; *Lewis & Co. v. Locke*, 41 Vt. 11; *Kimball v. Ladd*, 42 Vt. 747; *Bates v. Cilley*, 47 Vt. 7; *Stanton v. Proprietors of Haverhill Bridge*, 47 Vt. 172; *Hosford v. Railroad*, 47 Vt. 533; *Myers v. Lyon*, 51 Vt. 274; *Bachop v. Hill*, 54 Vt. 508.

The County Court had jurisdiction. The plaintiffs had a right to maintain their action by virtue of section 973, R. L.

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The Probate Court probably in the first instance had jurisdiction. R. L. ss. 2125, 2130.

Commissioners could not receive and allow claims after two years from the date of their appointment. R. L. s. 2121. A creditor could apply to the Probate Court within six months afterwards, but not later.

The court could renew the commission and allow a further time, not exceeding three months. R. L. s. 2122. The jurisdiction of the Probate Court was extinguished. The identical claim declared on in this action was presented to the commissioners within the time limited, but in the name of Angus alone, and the suit finally failed on the ground of non-joinder of the plaintiff Goff as a co-plaintiff. This suit was brought within one year from the time said suit was terminated.

Unless this case falls within the provisions of sections 973 of Revised Laws, plaintiffs are absolutely without legal remedy at law, and they have been defeated and debarred of all right of recovery, not by an adjudication upon the merits of their cause, but by a mere legal technicality, which miscarriage of justice, this statute was intended to prevent. The case certainly falls within the spirit of the statute, which is remedial and is to have a liberal construction. The provisions of said section are not limited to suits at law or in equity, to suits commenced in the County Court, or before commissioners appointed by the Probate Court, but they are general in their scope and apply to all actions wherever and however commenced.

By the provisions of sections 2129, 2142, 2143, 2144, 2145 and 2155 of Revised Laws, it is apparent that it was not intended to suspend the original jurisdiction of the County Court in matters against the estates of deceased persons, except during the time when the Probate Court furnished a tribunal for such claims. By the express provisions of the statute, when commissioners are not appointed, the original jurisdiction of the County Court remains; and it would also seem to follow that when the tribunal afforded by the commis-

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sioners has ceased to exist by operation of law, and a party still has a legal demand against the estate of the deceased, the original jurisdiction of the County Court, suspended during the existence of the tribunal afforded by commissioners, again becomes operative, and its jurisdiction is then the same as it would have been had commissioners never been appointed.

Section 2155 of Revised Laws permits a suit against administrators for claims against deceased persons when the appointment of commissioners is omitted.

The probate law does not destroy the general jurisdiction of the County Court, but simply suspends it during the life of the probate commissioners' court for each estate.

If County Court has jurisdiction there can be no question but what the case at bar is within the saving provisions of section 973 of Revised Laws, and can be maintained. *Phelps v. Wood*, 9 Vt. 403; *Spear v. Newell*, 13 Vt. 289; *Spear v. Curtis*, 40 Vt. 59; *Spear v. Braintree*, 47 Vt. 729; *Premo v. Lee*, 56 Vt. 60. It would seem that *Spear v. Braintree*, and *Premo v. Lee*, *supra*, are conclusive on this question.

*Dickerman & Young* and *Edwards & Burke*, for the defendants.

The County Court had no jurisdiction of the subject matter of the suit. The exclusive original jurisdiction of the settlement of estates of deceased persons is placed by statute in the Probate Court. R. L. ss. 2018, 2115.

Chapter 109 (being secs. 2132 to 2156) provides when "suits for and against estates" may be maintained; but sec. 2154 provides that "nothing in this chapter shall authorize a claimant to commence or prosecute a suit against an executor or administrator where commissioners are appointed on the estate, nor where a time is allowed by order of the Probate Court for such executor or administrator to pay the debts against the deceased, and no such suit shall be commenced or prosecuted except as provided by law for that purpose."

The only provision which we have discovered in the statute

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for *commencing or prosecuting* a suit against an executor or administrator, for the recovery of a debt due from the deceased, before the amount of such indebtedness has been determined by proceedings in the Probate Court, and an order has been made in that court for the payment of that debt or a dividend thereon, is in section 2155.

This section in no way authorized the present suit.

The exclusive original jurisdiction of the Probate Court and commissioners to try and decide upon claims, alleged to be due from deceased persons, in cases where commissioners have been appointed, has been repeatedly discussed before this court and invariably affirmed. *Atherton v. Flagg & Parker*, 2 D. Chipman, 66; *McCullen v. Hinckley*, 9 Vt. 143; REDFIELD, J., in *Burgess v. Gates*, 20 Vt. 326; *Probate Court v. Van Duzer*, 13 Vt. 135; WILLIAMS, Ch. J., in *Warner v. Crane*, 16 Vt. 79.

In *Bank of Orange County v. Kidder*, 20 Vt. 519, REDFIELD, J., says: "This case raises the question, how far the settlement of estates under the revised statutes is the same with the settlement of estates represented insolvent under the former statutes, in regard to the liability of administrators. Under the old statutes the case of *Probate Court v. Van Duzer*, 13 Vt. 135, fully establishes the principle that executors or administrators are not liable in their persons or property until after a final decree in the Probate Court fixing such liability and the extent of it."

"The entire jurisdiction of settlement of estates" is given to Probate Courts. *Adams v. Adams*, 22 Vt. 50; *Probate Court v. Slason*, 23 Vt. 306; *Boyden v. Ward*, 38 Vt. 632. The true reason for this is, that it cannot be known how much a creditor is entitled to recover until the estate is settled. POLAND, Ch. J., in *Probate Court v. Chapin*, 31 Vt. 373; *Probate Court v. Kimball*, 42 Vt. 323; *Ewing v. Griswold*, 43 Vt. 400; *Soule v. Benton & Wilson*, 44 Vt. 309; *Probate Court v. Kent*, 49 Vt. 380-388.

In *Powers v. Powers' Estate*, 57 Vt. 49-52, POWERS, J.,

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says: "By section 213, R. L., all pending suits at the time commissioners are appointed *shall be discontinued*. After such appointment no actions can be continued against the estate except for the recovery of real estate. 16 Vt. 82." See *Probate Court v. Gale*, 47 Vt. 473-7.

The County Court has only appellate jurisdiction. R. L. s. 2268. *Boyd v. Ward*, *supra*; *Holmes v. Holmes*, 26 Vt. 536; *Adams v. Adams*, 21 Vt. 164.

The plaintiffs cannot maintain their suit by virtue of section 973, R. L. (1) The former suit was not defeated "for matter of form." (2) This suit is not in favor of the same plaintiff. (3) It is not against the same defendants. (4) That section does not authorize the second suit to be commenced in a court which had no jurisdiction of the subject-matter when the first suit was commenced. *Angus v. Robinson's Estate*, 59 Vt. 585; *Spear v. Braintree*, 47 Vt. 729; *Premo v. Lee*, 56 Vt. 60, do not support the theory of the plaintiffs. *Howe v. Waltham*, 18 Mass. 451; *Walker*, 11 Mass. 140; *Gray v. Parker*, 16 Vt. 652. Again, the defendants are sued as individuals, and would be liable in their own estates. Cases, *supra*; *Barnes v. Hall*; *Probate Court v. Saxton*, 17 Vt. 621.

The opinion of the court was delivered by

Ross, J. The plaintiff Angus presented the claim involved in this suit to the commissioners on the estate of Lucius Robinson, who disallowed the claim. He appealed to the County Court, filed his declaration thereon, and such proceedings were had that the case passed to the Supreme Court, where it was decided that he could not maintain the action in his name alone, but that the claim, if any, must be prosecuted in the name of Goff & Angus. In the meantime the proceedings before the commissioners were closed, and the time had elapsed in which the Probate Court had power to renew the commission. Then this suit was brought directly to the County Court, and the contention presented by the pleadings



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is whether this suit can be maintained. The counsel for the plaintiffs concede that the claim is barred against the estate in the Probate Court, and that that court has no power to afford them relief; but contend,

I. That the County Court had jurisdiction of this claim, if no proceedings had been taken in the Probate Court on the estate of Lucius Robinson, and that this jurisdiction was only suspended while the Probate Court furnished a tribunal for the examination and allowance of the claim, or while it could legally keep the commission open. This contention cannot be sustained. It is doubtful if the County Court would have had jurisdiction of this claim if commissioners had never been appointed. R. L. s. 2155; *Boyden v. Adm'r of Ward*, 38 Vt. 628. But if in that case the County Court would have had jurisdiction of the claim, it had none when commissioners were once appointed. The whole trend of the provisions of the statute respecting the settlement of estates, which under the present law are represented and proceeded with as insolvent, and of the decisions of this court construing and applying them (see defendants' brief), is against the contention; and to the effect that when the jurisdiction of the Probate Court has been once invoked for the settlement of an estate, and commissioners have been appointed, it is absolute and exclusive in regard to all claims of an absolute or legal nature. The Court of Chancery only aids the Probate Court in regard to strictly equitable claims. From the nature of the business to be accomplished the Probate Court must have exclusive original jurisdiction. It is charged with gathering and reducing to money—so far as necessary—all the property of the estate; with determining, either in its own or in appellate tribunals, which must report their final determinations to it, all the absolute legal claims against the estate; and with appropriating the assets, first, to the payment in full, or *pro rata*, of all the established claims against the estate, and if there remain a surplus, with its distribution among those legally entitled thereto. For the accomplishment of these

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very necessary purposes, the original jurisdiction of the Probate Court, when once invoked, must be exclusive. Otherwise, interminable confusion and uncertainty would attend the settlement of estates. It is suggested that the fact that the estate was not closed in the Probate Court when this suit was commenced should aid in giving the County Court original jurisdiction.

But that fact can have no legitimate influence in the decision of the question of jurisdiction. This suit is not against the estate, as was the prosecution of the claim in the Probate Court, but against the defendants personally. Attaching to their names the word administrators is only descriptive of their persons. If determined against them, the execution would run against their property, and not that of the estate. There is no law requiring the judgment to be certified to the Probate Court, and that court might never have official knowledge of it. The administrators might be powerless to obtain any relief in the Probate Court. The payment which they might be legally compelled to make would not be a claim proved in the Probate Court entitled to participate in the distribution of the assets of the estate. If when the suit is commenced in the County Court the estate should be undistributed, it might not remain so when final judgment is rendered. The County Court has no power to stay proceedings in the Probate Court. While the suit was pending against them personally in the County Court, they might be discharged from administering, by the Probate Court, or decease, and they or their estates be cumbered and burdened with the judgment of the County Court, with no certain means of relief in the Probate Court. The judgment being against them personally could be collected in full, whatever the inability of the estate to pay in full. The County Court would have no power to order a *pro rata* payment of its judgment, nor to enforce payment from the assets of the estate at all. Neither would the Probate Court have power to allow or order a *pro rata* payment even of a claim established by the judg-

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ment of the County Court, which had become barred by failure to present it to the commissioners for allowance. The decisions of this court establishing that the jurisdiction of the Probate Court, when once legally invoked, is exclusive on all claims of this nature, and that the only jurisdiction left to the County Court is appellate, can be found cited in the defendants' brief.

II. It is further contended that the County Court has jurisdiction by section 973, R. L. That section has no application to the subject of jurisdiction. It is simply a modifier of the Statute of Limitations. It gives a plaintiff who has seasonably commenced an action against a party which has failed, among other things, "for matter of form," a year after such failure in which to commence a new action for the same cause of action. *Spear v. Braintree*, 47 Vt. 729, and *Premo v. Lee*, 56 Vt. 60, give countenance to the contention that the prosecution of the cause of action in the probate and appellate courts in the name of Angus, rather than of Goff & Angus, was a matter of form rather than of substance. The section was not intended to, and does not, apply to the effect of changing the jurisdiction in which the new action may be brought and prosecuted. It only gives further time, under the circumstances specified, in which to bring another better perfected action in the proper jurisdiction. The difficulty lies in the fact that the new action is brought in the County Court, which has no jurisdiction of the action, inasmuch as under the circumstances the jurisdiction of the Probate Court is exclusive. By the failure of these plaintiffs to present the claim, and obtain its allowance by the commissioners, or by the appellate tribunals, they are barred from recovering the demand, or from pleading it in offset in any action. R. L. s. 2125. The County Court correctly dismissed the action for want of jurisdiction. Having no jurisdiction of the cause of action, it had no right to allow an amendment, or take any action in the case, except to dismiss it.

That judgment is affirmed.

## S. S. BARTLETT v. JAMES WILSON AND TR.

*Taxation. Listers. Collector. R. L. ss. 326, 407.*

1. The defendant having failed to return a satisfactory inventory of his taxable property, there was no error in the action of the listers, under the statute,—R. L. s. 326,—in assessing him for money and debts and then taking the appraisal of his real estate in the preceding year, and doubling both items for his grand list.
2. In an action by a collector to recover a tax by trustee process under the statute,—R. L. s. 407,—the court having held that it was incumbent on the plaintiff to show that at the date of the writ the defendant had no known personal property in the State sufficient to pay the tax, it cannot be said that it was error to admit, for the purpose of proving such fact, an inventory made by the defendant in the town attempting to enforce the tax, and sworn to by him a few months prior to such date, and which included no personal property, although there was no evidence that the defendant was a resident of such town at that time.
3. But evidence was not admissible in behalf of the defendant which tended to show that he owned property subject to a lease; for such property cannot be distrained for taxes.

ACTION of assumpsit commenced by trustee process under section 407 of the Revised Laws by the plaintiff as collector of taxes for the town of Brownington. The plaintiff's writ was dated February 24, 1883, and served on the 27th day of February, 1883. The plaintiff claimed to recover a town tax of \$71.35, assessed on the grand list of the defendant in the town of Brownington for the year 1882. Plea, general issue.

Trial by jury, February Term, 1888, POWERS, J., presiding. General verdict for the plaintiff to recover \$71.35 and his costs, and a special verdict finding that the defendant had not known personal property in the State sufficient to pay said tax at the time said suit was commenced.

The defendant filed no inventory of his taxable property in Brownington, as required by law, for the year A. D. 1882.

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For that year the defendant was assessed by the listers for money and debts due the sum of \$3,646, and his real estate was taken at the appraisal thereof in A. D. 1881, viz., \$2,300, and his grand list for that year, completed on or before the 15th day of May, A. D. 1882, was made by doubling said assessment of personal property and appraisal of real estate, and setting one per cent of the amount of said personal and real estate so doubled in the grand list to the defendant. The defendant claimed that said grand list was illegal by reason of the doubling his real estate in making his grand list as aforesaid, and requested the court to so hold, but the court ruled that said grand list was not illegal by reason of the doubling the defendant's real estate as aforesaid; to which ruling and the refusal of the court to hold as requested the defendant excepted.

For the purposes of this trial only, the defendant conceded that said grand list in other respects was regular; that defendant was a resident taxpayer in Brownington on the first day of April, A. D. 1882; that the plaintiff was collector of taxes, and that he had lawfully demanded said tax of the defendant.

The defendant claimed that the plaintiff could not maintain this action for the reason that the defendant had known personal property in this State sufficient to pay said tax at the time this suit was commenced. The plaintiff claimed that said objection was out of time and too late, for the reason that this cause had been once tried by jury on its merits, and in the Supreme Court upon exceptions, and that defendant had never before raised this objection. The court found the facts as claimed by plaintiff (see this case in 59 Vt. 23), and ruled *pro forma* that said objection was seasonably raised, and that the burden of proof was upon the plaintiff to establish that defendant had "not known personal property in the State sufficient to pay such tax" when this suit was commenced; to which ruling plaintiff seasonably excepted. The plaintiff, as evidence tending to show that the defendant had not known

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personal property in this State at the commencement of this suit, offered in evidence a tax inventory made under oath by the defendant March 27, A. D. 1882, which inventory mentioned no property except defendant's real estate in Brownington, and the same was admitted in evidence by the court subject to the defendant's objection and exception. On this issue the defendant offered evidence to prove that at that time this suit was commenced he had between four and five hundred dollars worth of personal property on his farm in said Brownington, and several hundred dollars worth of personal property on his farm in Derby, a town adjoining said Brownington, and that said personal property was so exposed that the plaintiff, by ordinary inquiry, could have discovered the same; and that the defendant had leased his said personal property for a term, to expire on the first day of April, A. D. 1883, and that the same was at the commencement of this suit in the possession of the lessee, who was entitled to the possession thereof until the expiration of the term for which it was leased; and until long after it would be necessary for the plaintiff to complete his proceedings by sale, if he had attempted to levy the warrant annexed to this tax bill upon said property or any part thereof. This suit was brought to collect the sum of \$337.72 in taxes assessed upon different grand lists. The court excluded the evidence offered, to which ruling the defendant excepted.

Nothing appeared on trial as to defendant's having a residence in Brownington except the aforesaid concession that he resided there on the first day of April, A. D. 1882.

*L. H. Thompson* and *Geo. W. Cahoon*, for the defendant.

The grand list involved in this suit is illegal by reason of doubling the defendant's real estate in making said list.

The tax inventory made March 27, 1882, was improperly admitted. There was no evidence that at that time defendant was a resident of Brownington, and thus required by law to inventory his *personal property* in that town. The admission

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that defendant resided in Brownington April 1, 1882, raises no presumption that he resided there before that date.

A presumption of this kind runs forward, not backward, from an established or admitted fact. Although it might be true that defendant had no personal property taxable in Brownington in March, 1882, it would have no tendency to show how his property was situated in February, 1883.

The court erred in excluding the evidence offered as to the amount and value of defendant's personal property at the time this suit was commenced. It was largely in excess of what was required to pay all the taxes claimed, and many times the value of the taxes which were legal and collectible.

The defendant's reversionary interest in the leased personal property could have been sold for payment of taxes against him. The old law was changed by statute. Gen. Stat. p. 33, ss. 31, 32; R. L. ss. 1189, 1190-1. The property was attachable by leaving a copy in the town clerk's office. R. L. s. 876. By section 376, R. L., property which may be attached on writ by leaving a copy in the town clerk's office may be distrained by leaving in such office a copy of the warrant with the collector's return thereon.

Under the decision in *Clemons v. Lewis*, 36 Vt. 673, plaintiff was not confined to ten days, but might take a reasonable time.

He might have adjourned his sale, so that the lease would have expired, or sold subject to the lease. He had the same rights as any officer as to property taken on execution. *Spear v. Tilson*, 24 Vt. 420; *Wheelock v. Archer*, 26 Vt. 380; Rob. Dig. p. 664, s. 69, 72. The statute gives collector three years in which to collect tax. R. L. s. 379.

*Edwards, Dickerman & Young*, for the plaintiff.

The law of this case as to doubling the defendant's real estate is established by the former decision. The court, by POWERS, J., say: "No defects in the annual grand list for 1882, completed on the 15th of May, are pointed out, and

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such list is to be treated as valid." *Bartlett v. Wilson*, 59 Vt. 23, 31. The defendant's tax inventory was admissible. It was not offered as conclusive, but as tending to support the issue; namely, that he had no known personal property, etc. Does not the fact that he had none March 27, 1882, and with no evidence tending to show the acquiring of any after March 27, 1882, tend to show that he had none in Brownington, February 24, 1883? If it does, then it tends to show that he had none in the State.

The property subject to the lease could not be taken for the taxes. Such property cannot be attached by the officer taking it into his possession (48 Vt. 607), nor by a copy lodged in the town clerk's office; because this would not be according to the provisions of the statute, as required by the decision, 48 Vt. 607.

It is well settled that the law gives no remedy for the collection of taxes other than those provided by statute. *Barnes v. Hall*, 55 Vt. 420. "The power of an officer making a tax sale is purely statutory." *Ib.*

In distress for non-payment of taxes no valid lien could be created on personal property, unless the collector took actual possession, until the Act of 1878. *Ib.* See R. L. ss. 1189, 1190. Hence there was no error in excluding the evidence.

The opinion of the court was delivered by

TAFT, J. I. For a failure by the defendant, in the spring of 1882, to return an inventory of his taxable property satisfactory to the listers, the latter assessed him for money and debts, took his real estate at the appraisal thereof in the preceding year, and made his grand list by doubling both items. The defendant claims that the list was illegal because of the doubling of the real estate appraisal. No question was made upon trial as to the proceedings of the listers save the doubling of the appraised value of the real estate. R. L., sec. 326, required the listers, in a case like that of the defendant then before them, to double the sum obtained as the appraised



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value of the taxpayer's property ; and this irrespective of its character, whether real or personal. The doubling process did not render the list illegal, as the listers, in so doing, acted strictly in accordance with their duties under the statute referred to.

II. The defendant, upon trial, claimed, and the court held, that it was incumbent upon the plaintiff to prove that, at the date of the writ, 24th February, 1883, the defendant had no known personal property in the State sufficient to pay the taxes he was seeking to recover. It was, therefore, not only proper but necessary for the plaintiff to show that the defendant had none in Brownington. To aid in establishing this fact, the plaintiff was permitted to put in evidence an inventory made by the defendant in Brownington on the first day of the preceding April, and sworn to on the 27th of March prior, which did not include any personal estate. To this the defendant objected, for that there was no evidence that at that time he was a resident of that town and so required by law to inventory his personal property in that town. Whether he resided in Brownington or elsewhere, he may have had personal property in that town, subject to taxation there, which it would have been his duty to include in an inventory in that town. R. L. s. 281, sub-div. I. and IV. We think the inventory sworn to an admission, that he had no personal property at that date in that town. And we think the fact that he had none on the first day of April evidence tending to show that he had none there a few months later. The fact that he had none in April, 1882, rendered it less likely that he had none in February following, than if he had had at the former date vast possessions of personal estate. The more remote in time that such fact exists, the weaker the evidence, but in this case, it was so near in time that we cannot say there was error.

III. Did the court err in excluding the testimony offered by the defendant? It tended to show that he owned property in this State subject to an unexpired lease. If the property

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could have been distrained for taxes, it was admissible. Could it have been taken by the plaintiff upon his warrant? In *Barnes v. Hall*, 55 Vt. 420, it is said: "That unless personal property is of that character and so situated that actual possession thereof can be taken, or there is some statutory provision for distraining it without taking such possession, it cannot be distrained at all." The plaintiff could not have taken actual possession of it, as it was then held under a lease. *Brigham v. Avery*, 48 Vt. 602. We have no statute by which he could have taken it in any other mode; for section 376, R. L., as amended by Act, No. 11, 1882, applies only to such property as may be attached by leaving a copy with the clerk of a town or officer of a corporation; and property held by a lessee cannot be attached in that manner, but only in the way pointed out by R. L. ss. 1189-91. The testimony, therefore, had no tendency to show that the defendant had property which the plaintiff could have distrained; it was, therefore, immaterial, and its exclusion proper.

Judgment affirmed.

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Stone v. Glover.

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## ELIJAH STONE v. TOWN OF GLOVER.

*Pauper.*

1. In an action by one to recover of a town for keeping a pauper, it is error for the court, if the element of transiency is in the case, to charge the jury that the plaintiff could not recover for anything furnished the pauper after the defendant's overseer notified him that he would not pay therefor.
2. One may be a transient pauper, although his disability is not caused by a *sudden* visitation of disease or accident.

ASSUMPSIT to recover for keeping one Mary Stone, mother of the plaintiff, an alleged pauper of the defendant town, from the first day of March, 1886, to the 23d day of July, 1887, and for certain articles of clothing furnished the pauper. Trial by jury, February Term, 1888, POWERS, J., presiding. Verdict for the plaintiff to recover \$19.50. Exceptions by plaintiff.

It appeared that in 1877 or 1878, the defendant town accepted said Mary Stone as a pauper belonging to said town, and supported her from that time until March 1, 1886, as such, with the exception of about six months, when she was away to Canada with a son who resided there; that in the year 1882, one Dwinell, overseer of the poor for the town of Glover, made a contract with the plaintiff to support the said Mary Stone for the ensuing year, and shortly thereafter brought the pauper to the plaintiff's in Glover; that at the March meeting, 1883, one C. P. Bean was chosen overseer of Glover which office he continued to hold until the present time; that on the 22d day of May, 1883, he called upon the plaintiff, who had continued to keep the pauper to that time, and made a contract, in writing, with him to keep her to the first day of the following March; that after the close of that year the overseer

again called upon said plaintiff, and it was agreed that said contract should be extended to the first day of March, 1885; that some time after the close of that contract the overseer again called upon the plaintiff, and it was agreed that said contract should be further extended to the first of March, 1886; that at the March meeting, 1886, the overseer paid the plaintiff all that was his due for keeping the pauper, and all that was in any way due to the plaintiff on account of anything furnished to the pauper at that date, except a small amount for clothing furnished to her before that time. It appeared that the pauper had been kept continuously by the plaintiff from the time she was brought to his house by Joseph Dwinell, in 1882, until the time of the trial, and that no contract had been made with the plaintiff during said time to do anything with or for the pauper, except to keep her, and, on some occasions, to furnish her with some little necessities. It also further appeared that nothing passed between the overseer and the plaintiff relative to keeping the pauper after said March meeting, 1886, until May 21, following, at which time the overseer notified the plaintiff that the defendant would no longer support said pauper. The plaintiff claimed, and gave evidence tending to prove, that on the first day of June, 1886, he gave said overseer notice to take said pauper away, and that if he neglected to do so he, the plaintiff, should charge \$1.75 per week for keeping her thereafter; that the overseer then notified the plaintiff that he should neither take her away nor pay for keeping her.

The defendant's evidence tended to prove that the plaintiff did not notify the overseer at the last named interview to take the pauper away, but did notify him that he should charge \$1.75 per week so long as the pauper remained there with him.

The plaintiff's evidence further tended to prove that the pauper was poor and in need of relief, and unable to support herself, and that she had been insane since 1868, but gradually growing worse until the time of trial.

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Stone v. Glover.

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*W. W. Miles*, for the plaintiff.

Mary Stone, the pauper, was a *transient person* within the meaning of section 2818, Rev. Laws, and upon the refusal of the overseer of the poor of defendant town to take charge of her when notified so to do by the plaintiff, said plaintiff became entitled to recover against said town for support thereafter furnished to her, under and by virtue of said section. R. L. ss. 2814-15-18; Acts of 1886, No. 42; *Goodell v. Mount Holly*, 51 Vt. 432; *Charlestown v. Lunenburg*, 23 Vt. 525.

The jury must have found that there was no such contract between the pauper and the plaintiff as was claimed by defendant, because they found for the plaintiff to recover \$19.50 damages. They could not have found for the plaintiff to have recovered that sum without finding that there was a legal and binding contract on the part of the town to pay for the pauper's support, either expressed or implied. *Wheeler v. Washburn*, 24 Vt. 293; *Pomroy v. Slade*, 16 Vt. 222; *Mason v. Peters*, 4 Vt. 101; *Russell v. Buck*, 11 Vt. 166; *Ib.* 66; *Cole v. Shurtleff*, 41 Vt. 311.

*L. H. Thompson*, for the defendant.

The overseer of the poor is charged with the support of poor persons, but he is the sole judge as to who shall receive the bounty of the town. R. L. s. 2815; *Houghton v. Danville*, 10 Vt. 537; *Holloway v. Barton*, 53 Vt. 300. When defendant's overseer decided that plaintiff's mother was no longer to receive support from defendant, and so notified the plaintiff, that ended his right to recover of defendant for her support, unless she was a transient person suddenly taken sick or otherwise disabled and confined at a house other than her home, within the meaning of section 2818 of Rev. Laws. The exceptions are utterly devoid of any fact which brings the case within this section of the statute.

If the case discloses that the pauper was disabled by the sudden visitation of disease, or sudden accident, which it does

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not, it is bare of one element absolutely essential to bring the plaintiff's case within this section of the statute, viz., the fact that being so disabled she was "thereby confined at the house of some one whose house is not her home." *Goodell v. Mount Holly*, 51 Vt. 426.

Towns are only liable for the support of paupers when they are made so by some statutory provision. *Ives v. Wallingford*, 8 Vt. 227; *Houghton v. Danville*, 10 Vt. 537.

The pauper was insane, hence, the Act of 1886, No. 42, s. 8, relieved the defendant of all liability to support her after November 24, 1886, the time the act took effect.

The opinion of the court was delivered by

ROWELL, J. It was error to charge that if the overseer notified plaintiff on June 1, 1886, that he should not pay him for keeping the pauper, that no recovery could be had for keeping her thereafter; for it denied all right of recovery on the ground of the pauper's transiency, which was an element in the case, and that phase of it should have been submitted to the jury, with proper instructions.

Defendant argues that that question was not involved, because it says that it does not appear that the pauper was disabled by the *sudden* visitation of disease or accident, nor that she was confined at a house not her home, but that on the contrary it appears that she was where she had contracted for and had a right to be, and so was at home.

As to the first proposition, it is not necessary that the disability should be caused by the *sudden* visitation of disease or accident. "Otherwise disabled" is enough, and the evidence tended to show that. *Charleston v. Lunenburgh*, 23 Vt. 525, is full authority for this.

As to the second proposition, there was evidence *pro* and *con* in respect of her having by contract a right to a home with the plaintiff; but that question was not submitted to the jury, for this branch of the case was wholly taken from it by that part of the charge to which exception was taken.

Judgment reversed, and cause remanded.

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Canfield v. Bentley's Estate.

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BENNINGTON COUNTY, FEBRUARY TERM, 1888.

Present: ROYCE, Ch. J., VEAZEY, TAFT and ROWELL, JJ.

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A. S. CANFIELD v. ELIAS BENTLEY'S ESTATE.

*Witness.* R. L. s. 1002. *Co-Surety.*

Where a surety on a promissory note has paid it, in an action by him against the estate of a deceased surety on the same note, to recover the amount so paid, the maker is a witness under the statute,—R. L. s. 1002,—to prove that the plaintiff was not a co-surety, but only a surety for the deceased.

APPEAL by defendant from a decision of commissioners upon the estate of Elias Bentley, deceased. Trial by jury, June Term, 1887, Ross, J., presiding. Verdict for plaintiff. The case appears in the opinion.

*J. C. Baker*, for the defendant.

The contract or cause of action on trial in this case, was the contract express or implied between Elias Bentley, deceased, and A. S. Canfield, when the note was executed to Jane Mat-tison; and the question in dispute was whether Elias Bentley and Canfield were sureties for Abel Bentley, or whether Can-field was surety for Elias Bentley.

If both Elias Bentley and Canfield were joint sureties for Abel, Abel was the other party to the agreement to indemnify his sureties, and this being the contract or cause of action in issue and on trial, Abel Bentley was not a competent witness as against the estate of Elias Bentley. R. L. s. 1002; Whart. Ev. s. 466.

The other party referred to in the statute, is the other party to the contract or cause of action in issue and on trial, and not the party to the suit on the record. Whether the witness is a party to the record or not, makes no difference as to the

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statutory incompetency of the witness. *Barnes v. Dow*, 59 Vt. 530.

The exclusion relates as well to the substantial issues made by the evidence as to the formal issues made by the pleadings. *Hollister v. Young*, 41 Vt. 156; *Hollister v. Young*, 42 Vt. 403; *Insurance Co. v. Wells*, 53 Vt. 14; *Pember v. Congdon*, 55 Vt. 58; *Barnes v. Dow*, *supra*.

*Batchelder & Barber*, for the plaintiff.

Abel Bentley was a competent witness. He was not one of the original parties to the contract or cause of action in issue. The contract in issue was between the plaintiff and the deceased. *Bank v. Schofield*, 39 Vt. 594; *Lytle v. Bond's Estate*, 40 Vt. 618; *Benoit v. Paquin*, 40 Vt. 205; *Cole v. Shurtleff*, 41 Vt. 311; *Hollister v. Young*, 41 Vt. 156; *Downs v. Belden*, 46 Vt. 674; *Morse v. Low*, 44 Vt. 561; *Taylor v. Finley*, 48 Vt. 78; *Chaffee v. Hooper*, 53 Vt. 573; *Insurance Co. v. Wells*, 53 Vt. 14; *Pember v. Congdon*, 55 Vt. 58; *Richardson v. Wright*, 58 Vt. 371; *Barnes v. Dow*, 59 Vt. 530.

The opinion of the court was delivered by

Taft, J. Jane Mattison held the note of Abel Bentley. The plaintiff and Elias Bentley, the defendant's intestate, were sureties thereon. The plaintiff paid the note and seeks in this action to recover of the defendant's estate the amount so paid, upon the ground that by contract with said Elias he was surety for him, not co-surety with him, for Abel the principal. Whether the plaintiff was surety for Elias, or co-surety with him was the sole question in controversy, and the only point reserved by the exceptions is, was Abel a competent witness. The question of Abel Bentley's liability to his sureties, was not in issue. It was lawful for the plaintiff to contract with his co-surety as to the relation he, the plaintiff, should sustain to him, and in this contract Abel Bentley had no interest, and was no party to it, and in an action to enforce it would be a competent witness; would not be excluded by sec. 1002 R. L. Judgment affirmed.



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Lawrence v. Graves' Estate.

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## SARAH LAWRENCE v. E. A. GRAVES' ESTATE.

*Evidence. Bills and Notes. Statute of Limitations.*

1. An indorsement upon a note, though not in the handwriting of the payor, is some, but not sufficient evidence of payment, and may be weighed in determining whether a payment in fact had been made, as bearing upon the Statute of Limitations.
2. The party who made the indorsement was properly allowed to testify to the circumstances attending the making of it.
3. Error cannot be predicated upon the improper answer given by a witness to a proper question; thus, when the questions were pertinent to elicit evidence showing that a payment had in fact been made as appeared by an indorsement, error cannot be predicated on an answer, even if it contravenes the statute,—R. L. s. 1002—which excludes a living party when the other party is dead.

APPEAL from the Probate Court for the district of Manchester. The plaintiff's declaration consisted of the common counts in assumpsit and a special count upon a promissory note for \$700, dated March 5, 1873, signed by the deceased, E. A. Graves. Pleas, general issue and Statute of Limitations. Trial by jury, June Term, 1887. Ross, J., presiding. Verdict for the plaintiff.

As circumstances tending to show a payment at the time of said indorsement, evidence was admitted that Mr. Graves prior to the date of the indorsement spoke of being indebted to the Lawrences; that, at one time, he said he owed the plaintiff and had been down to pay her, &c. But there was no witness who testified to the payment of this money as indorsed upon the note. The testimony also tended to show that Franklin E. Lawrence, a brother of the plaintiff, also held a note against Mr. Graves, that came from his father's estate, and that Ralph Graves, a son of E. A. Graves, and who lived with him, also was indebted to the plaintiff upon another note.

Said Franklin E. Lawrence was called as a witness by the plaintiff, and testified that the indorsement upon the note in

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Lawrence v. Graves' Estate.

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question was his (the witness') handwriting, and that Mr. Graves (the deceased) was not present when it was made, and that he never had any conversation with Mr. Graves upon the subject. The plaintiff's counsel then asked the witness this question: "How came you to put that indorsement on there?" The defendant objected to the question, and the plaintiff's counsel modified it as follows: Q. "Now, you may state why you put this indorsement upon the note,—without stating any conversation that took place between you and Sarah—state what enabled you to put it on—why you put it on." Objected to by the defendant. Admitted by the court and the defendant excepted. Answer. "On the 23d of August, I went to my sister's and my sister brought me \$10. I gave her the key to the desk and she went into the sitting-room where the desk was, and she came out with her note and mine, and \$10. I took the ten dollar bill and gave her back \$5, and indorsed \$5 on my note and \$5 on this note." The defendant excepted to the answer.

The counsel for the plaintiff then made the following offer in the presence of the jury: "I offer to show by this witness that at the time he went to his sister's, on the 23d of August, and when she brought him the two notes and the \$10, as he has stated, she then told him that Mr. Graves had been there, and that the money came from him,—\$5 of the ten to apply on this note."

*J. G. Martin* and *J. C. Baker*, for the defendant.

The plaintiff seeks to avoid the statute by a new promise arising from an alleged payment of \$5 on August 22, 1883. As evidence to establish the fact of payment, she offered an indorsement upon the note, in the handwriting of F. E. Lawrence, and against objection it was admitted. The indorsement was not a new promise. It was made by the procurement of the plaintiff. Section 975, R. L., is intended as a restriction upon evidence and not an enlargement. We claim the only force of this section is to make the payment sufficient to remove

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the statute bar, but the indorsement is not proof of the fact of payment. The evidence contravenes the statute, R. L. ss. 1000-2-3. Sarah Lawrence could not be admitted to testify to the fact of this payment. But what was used as evidence was a memorandum made by a third person who knew nothing of the fact except what she told him.

*Batchelder & Barber and H. K. Fowler*, for the plaintiff.

This indorsement with the other evidence was admissible as tending to show a payment. *Bailey v. Danforth*, 53 Vt. 504. If the indorsement was admissible, the testimony of F. E. Lawrence was legitimate. All facts upon which any reasonable presumption or inference can be founded as to the truth or falsity of the issue, are admissible in evidence. *Richardson v. W. & R. Turnpike Co.* 6 Vt. 496; *Kimball v. Locke*, 31 Vt. 683; *Cleaveland v. Dinsmore*, 59 Vt. 436.

Again, we say that the circumstances attending the making by witness of this indorsement as given in his testimony are admissible as a part of the *res gestæ*. Greenl. Ev. 128; *Barber v. Bennett*, 58 Vt. 476; *Bank of Woodstock v. Clark*, 25 Vt. 308; *State v. Howard*, 32 Vt. 380; Stark. Ev. 85.

The opinion of the court was delivered by

ROYCE, Ch. J. This was an action of assumpsit, in which the appellant claimed to recover the amount due upon a promissory note dated March 5, 1873, signed by the said E. A. Graves and made payable to Russell Lawrence, the father of the plaintiff, or bearer, in one day after date, with interest annually. In the settlement of her father's estate the plaintiff became the owner of the note. The defence relied upon was the Statute of Limitations.

There were three indorsements on the note, one dated March 11, 1874, one May 22, 1878, and one of \$5, dated August 22, 1883. No question was made about the first two, but the defendant denied that the third indorsement represented an actual payment, and it not being in the handwriting of E. A.

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Graves, he objected to its being received as evidence. The court admitted it in connection with the other evidence in the case as a circumstance tending to show an actual payment, and the defendant excepted to that ruling.

The decision made in *Bailey v. Danforth*, 53 Vt. 504, we regard as decisive of the question presented by this exception. There, as here, the action was brought to recover upon a promissory note, and the defence made was the Statute of Limitations. There was an indorsement of \$3.00 made upon the note within six years of the commencement of the action, and the plaintiff offered said endorsement as evidence tending to show part payment of the note. It did not appear that the indorsement was made by the holder or payee of the notes but it was used in evidence for the purpose for which it was offered ; and the court say that such an indorsement may be weighed in determining whether payment has been made, though of itself not sufficient to establish the payment.

It appeared that the indorsement on the note was made by Franklin E. Lawrence ; and the plaintiff was allowed, subject to the objection and exception of the defendant, to put the following question to Lawrence : " Now you may state why you put this indorsement upon the note without stating any conversation that took place between you and Sarah. State what enabled you to put it on—why you put it on." The question did not call for any conversation that he had with the plaintiff at the time the endorsement was made and the answer given did not embrace any such conversation ; but in stating the circumstances attending the making of the indorsement he stated what the plaintiff did in the matter of receiving the \$5.00 that were indorsed. And he also stated, subject to a like objection and exception, that he made the indorsement by the direction of the plaintiff. The witness had testified that he made the indorsement, and the question put to him called for an explanation as to why he made it.

It was allowable to show what transpired at the time the indorsement was made. *Barber v. Bennett*, 58 Vt. 476. The

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indorsement as we have seen, was evidence, but standing alone, not sufficient evidence, of a payment. It was incumbent on the plaintiff to introduce other evidence tending to show that such a payment was in fact made as appeared by the indorsement; and what took place at the time the indorsement was made would be pertinent evidence upon the question whether such payment was made. The questions put to the witness were proper and appropriate to elicit that information.

But it is claimed that the answers given by the witness contravened secs. 1002 and 1003 of R. L., which exclude the testimony of living parties when the other party is dead.

Without considering whether the answers were such as claimed, it is sufficient to say that error cannot be predicated upon an improper answer to a proper question. *Tracy v. Gusha*, 59 Vt. 257; *Houston v. Russell*, 52 Vt. 110. For, as is said by Judge Poland in *Randolph v. Woodstock*, 35 Vt. 291, "If every trial in the course of which some witness, either by ignorance or design, makes some remark which is not proper evidence, must be regarded as a mistrial, very few verdicts could stand."

The judgment is affirmed.

**ELIJAH BARBER'S ADM'R v. ROBERT W. BENNETT.***Evidence. Declaration of party in interest.*

The declarations of a real party against the validity of a claim, though made before he became the owner of the claim, are admissible and competent evidence as tending to prove a defence in a suit founded upon such claim; and it is error to limit the declarations to merely impeaching testimony.

ASSUMPSIT in common counts, commenced by Elijah Barber in his lifetime. Trial by jury, December Term, 1887, POWERS, J., presiding. Verdict for the plaintiff.

It appeared and was not disputed that before the commencement of this suit Elijah Barber assigned and transferred to his daughter, Harriet Jewett, all claims in his favor against the defendant and that this cause is being prosecuted for the use and benefit of said Harriet Jewett.

Said Harriet Jewett was examined as a witness on the part of the plaintiff and testified somewhat as to the board bill and what was the relation to the family of the defendant while he lived at the house of said Barber.

The defendant then called two or three witnesses who testified that said Harriet Jewett had told them prior to 1871 and years before said assignment to her, that the defendant more than paid his board while he so lived and boarded in the family, and while she as the wife of Charles Jewett was also a member of the same family.

The court charged the jury in part:

“ There is another class of evidence in this case, gentlemen, that it is proper for me to call your attention to, and that is evidence that has been produced here to show that some one of the parties or witnesses has made statements out of court different from the statements or testimony that they have given

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in court. To illustrate that idea, I call your attention to the testimony of Mrs. Jewett. This is one instance of it and there are others. Some witness has testified that Mrs. Jewett on one occasion, when she was there at Mr. Barber's house, told her that Dr. Bennett brought into the house provisions or supplies enough to pay for his board. I have not stated the exact language of the witness and I don't remember it. That is the idea; you are to rely upon your own recollection of this evidence or the substance of it; but as I remember it, she testified that Mrs. Jewett said in substance that Dr. Bennett had furnished enough to pay for his board. If that was true then of course he does not owe that board bill. Mrs. Jewett says she never made that statement. Now suppose she made that statement, what is the effect you are to give to the testimony of this lady who testifies to this statement? It does not establish the fact; it is not evidence tending to support the fact that the doctor actually did bring enough into the house to pay for his board; it is not to be used for that purpose. If Mrs. Jewett had told a score of witnesses that same thing, it would not be evidence that would give you the right to find the fact that Dr. Bennett did furnish enough to pay his board bill. You are not to use it for that purpose, but the law gives you the right to use such contradictory evidence for the simple purpose of impeaching the credibility of Mrs. Jewett; that is to say, if you find that Mrs. Jewett has made such a statement out of court and those statements are inconsistent with the testimony which she gives in court, then the question arises, how much can I rely upon the testimony of Mrs. Jewett, how much is she affected by this contradiction, how much less trustworthy is she in view of the fact that she has told one story out of court and another in court. And then if you find that she is to some extent impeached in respect to her trustworthiness in this behalf the question arises, how much reliance shall I give to the rest of her testimony. That is all the effect it has."

The other facts are sufficiently stated in the opinion.

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*W. B. Sheldon and J. C. Baker*, for the defendant.

The defendant claims that as Mrs. Jewett is the real party in interest in this suit, and her relations to the transaction were such, that her statements were evidence against her that the fact was as she stated it. The law in regard to this class of evidence looks chiefly to the real parties in interest, and gives to their admissions the same weight as though they were parties to the record. 1 Greenl. Ev. s. 180.

It is not material that Mrs. Jewett took her assignment after she made the admission. Before she became the party in interest, the admission could be used as between the original parties, only to affect her credit as a witness, but when she becomes a party and prosecutes a suit, in the name of her assignor, to collect payment for this very matter that she had before admitted had no merit, those declarations are evidence against her that the fact is as she stated it.

*Batchelder & Bates and Burton & Munson*, for the plaintiff.

The testimony as to statements made by Mrs. Jewett was evidently offered to impeach her credibility, and was not admissible for any other purpose. The general rule as to admissions is that they must have been made while the party making them had some interest in the matter. 1 Greenl. Ev. 219. The ground on which admissions are received in evidence is that men may be relied upon to protect their own interest, and that when they admit anything against their interest it may safely be taken as direct evidence of the fact. 2 Best, 660.

Statements made by a person before he acquired his interest cannot be shown as admissions. *Dent v. Dent*, 3 Gill (Md.), 482; *Lawrence v. Boston*, 119 Mass. 126; *Burton v. Scott*, 3 Rand. (Va.) 399.

The opinion of the court was delivered by

ROWELL, J. The cause of action in this case, if any there be, is non-negotiable and was assigned to Mrs. Jewett, the intestate's daughter, before suit brought, who thereby became



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the equitable owner thereof, and the suit is prosecuted for her benefit; so she is plaintiff in interest. One item sought to be recovered is for defendant's board in the intestate's family from October, 1867, to October, 1870, during most of which time Mrs. Jewett and her husband were also members of the family, and Mrs. Jewett had knowledge of the justness of the item.

The defendant showed by several witnesses that before 1871, which was long before the assignment to her, Mrs. Jewett said that the defendant more than paid his board while he lived in the family. Mrs. Jewett was a witness, and denied having made such statements. In the charge the court limited the testimony to the impeachment of Mrs. Jewett, and denied its competency as tending to show the fact of payment, to which the defendant excepted, and we think the exception broad enough to raise the question.

*Robinson v. Hutchinson*, 31 Vt. 443, if followed, is decisive on this point. There a will was contested on the ground of want of testamentary capacity, and undue influence of the executor and his brother, who were sons of the testatrix and legatees under the will. The contestants proved that at one time when his mother was sick, about four years before the will was made, the executor said she "did not know what she was talking about"; and this was held proper, because he had consented to act as executor, and had taken upon himself the duty of sustaining the will, and was interested in its provisions. It is not important that the executor was a party of record as well as in interest, for the law looks chiefly to the real parties in interest, and regards them as though they were parties of record—1 Greenl. Ev. s. 180; 1 Phil. Ev. \*486; *Hanson v. Parker*, 1 Wils. 257—while, on the other hand, the admissions of a party of record who is a mere trustee, or whose name is used as matter of form, are not receivable. *Sargeant v. Sargeant*, 18 Vt. 371. Nor, as we shall see hereafter, are the admissions of one who sues in a representative capacity only, unless made while that character was sustained

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We think *Robinson v. Hutchinson* is sound, though *Burton v. Scott*, 3 Rand. (Va.) 399, is a similar case, and decides the other way, on the ground that the rule, that the admissions of a party are evidence against him, rests upon the presumption that no one will make a declaration against his own interest unless it is true, and hence, that the interest must exist when the declaration is made. If this were the true ground of the rule, the logic of that case is irresistible. But it is not the true ground. The mistake lies in supposing the presumption to be the test of admissibility, whereas it is only a test of credibility; for, as said by Professor Greenleaf, in regard to many admissions it cannot be supposed that at the time of making them the party believed they were against his interest, but often the contrary. Therefore, he says, such evidence seems to be more properly admissible as a *substitute* for the ordinary legal proof. 1 Greenl. Ev. s. 169. Mr. Wharton says it is admissible, either as yielding presumptions against the party charged, or as relieving (under ordinary circumstances) the party offering it from the necessity of more formal proof. 2 Whart. Ev. s. 1077.

Mr. Justice Stephen defines an admission to be a statement that suggests an inference as to a fact in issue or a fact that is relevant or deemed to be relevant to such fact, made by or on behalf of a party to a proceeding; and says that every admission is deemed to be a relevant fact as against the person making it, except in certain cases; as, when made by a person suing or sued in a representative character only, in which case it must be made while the person making it sustained that character. Steph. Dig. Ev. 53, 54. *Dent v. Dent*, 3 Gill, 482, to which we have been referred, comes within this exception; and there are many other cases to the same effect. So when by succession of title a party to a suit is so far in privity with another that he could be affected by his acts, then he can be affected by his admissions only when they are made during the latter's interest in the subject-matter of the suit; for then only can he engraft them upon the interest so that they will

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follow it into the hands of his successor. But as to the self-disserving declarations of the real party to the suit, this, as we have seen, is not the test of admissibility. And although the best text writers do not all suggest precisely the same ground of admissibility, yet we venture to say that it is a sufficient ground that they are the declarations of a party in interest and are relevant to the issue.

This view renders it unnecessary to consider the other exception.

Judgment reversed and cause remanded.

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Read v. Moody.

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WINDHAM COUNTY, FEBRUARY TERM, 1888.

Present: ROYCE, Ch. J., VEAZEY, TAFT and ROWELL, JJ.

LAVANT M. READ, ASSIGNEE IN INSOLVENCY OF  
CLARENCE L. MOODY, v. LEWIS P. MOODY.*Insolvent Law.*

In an action by an assignee claiming to recover on the ground that the defendant purchased property of the insolvent debtor in fraud of law, where the referee reported that he was not able to find that the defendant had reasonable cause to believe that the debtor was insolvent, but submitted to the court whether certain facts found should have put him upon inquiry; namely, that the transfer was not made in the usual course of business; that the debtor sold out his entire stock to one person; that defendant made no inquiry as to his financial condition; *Held*, that these were *prima facie* evidence of fraud, and threw the burden of proof on the defendant to sustain the validity of the transaction; and that he was put upon inquiry.

Heard on the report of a referee, September Term, 1887,  
Ross, J., presiding.

Judgment for the plaintiff to recover \$2,678.82. The referee found in part:

"Charles P. Wheeler, and Clarence L. Moody, a son of the defendant, were partners in the business of a meat market at Bellows Falls, from October 1, 1878, till March 17, 1884, when Wheeler sold his interest to Moody for \$2,500, taking two notes therefor, one for \$800, secured by a mortgage on a piece of real estate owned by the company, and the other for \$1,700, secured by a lien on the personal property of the company. It was agreed that said Wheeler should proceed to collect the debts due the company, amounting to about \$7,000, and that the debts due from the company, amounting to about \$10,000, should be paid by him as he made collections. The last of the following July the partners made a final settlement of their partnership business, by which it was found that Moody was indebted to Wheeler in the further sum of \$2,500, for which he gave him his note without security.

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"On said 11th day of March, the fresh and salt meats and lard that the company had on hand were sold to the defendant for \$1,645.43, and he gave his note payable to the company for the sum. This sale was made to close out the company business, and with the understanding that the defendant bought the property for his son. This note was reckoned among the assets of the company in said July settlement. At that time it was in the National Bank of Bellows Falls, where it had been deposited by Wheeler & Moody as collateral security for the payment of a \$1,000 note given by them to said bank, and endorsed by the defendant. Clarence L. had the property for which the note for \$1,645.43 was given, and it was understood between him and his father that he owed his father for it. He continued said business in his own name until the 30th of the next August, when he sold the business, book accounts and other property pertaining to the market to said Wheeler for about \$7,300, Wheeler deducting from the purchase price the amount of his three notes against said Clarence L., and giving him for the balance one note for \$1,000, payable in fifteen days, and another note for \$1,266.35, payable in thirty days from date."

"Said Wheeler bought said business and property in order to get payment of his notes of said Clarence L., and knowing he could sell it to Bidwell & Proctor, to whom he did make a sale of the same simultaneously with his purchase of it."

"On the morning of September 1, 1884, at about five o'clock, said Clarence L. called at the defendant's house and handed him said two notes of \$1,000 and \$1,266.35, which Wheeler had given him, and left the State by an early train, never to return to reside. Said Clarence L. called his father from his bed to give him these notes, gave him no directions how to apply them, or what to do with them. He merely said he had sold out to Wheeler, and 'here are the notes,' and that he was going to Boston. On the same day the defendant saw Wheeler and informed him that he held these notes. The note for \$1,645.43 was got out of the bank by Wheeler paying the bank the \$1,000 note which it held against Wheeler & Moody, and the defendant applied the \$1,000 note and the note for \$1,266.35 on the notes for \$1,645.43 and \$1,000 which his son owed him, and delivered Wheeler's said notes to him."

The other facts are sufficiently stated in the opinion.

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*George A. Weston and Haskins & Stoddard*, for the defendant.

To enable the plaintiff to recover, he must affirmatively establish: 1. That Clarence L. must have been insolvent at the time he made said payment or transfer. 2. The defendant must have had reasonable cause to believe that his son was thus insolvent. 3. Said payment must have been made with a view to give a preference. Bump on Bankruptcy, p. 844; *Larkin v. Hapgood*, 56 Vt. 601.

In *Forbes v. Howe*, 102 Mass. p. 436, it is said, "The proposition of 'reasonable cause to believe,' is one of fact, to be established by proof and found by the jury. In order to render a verdict for the plaintiff it was necessary for the jury to find that the defendant had reasonable cause to believe that Josselyn intended the mortgage as a preference." The only claim which the plaintiff can urge to maintain an unlawful preference is that said payment was not made in the ordinary course of business, and was by virtue of section 1861 of Revised Laws, *prima facie* evidence of fraud.

The question whether a certain transaction was out of the ordinary course of business, within the meaning of the statute, is a question of law. Bump, Fraud. Con. 26; Bump on Bankruptcy, 852; *Nary v. Merrill*, 8 Allen, 451.

The transaction must have been out of the usual course of the *business of the debtor*. Cases *supra*. Such a course of business is only *prima facie* evidence of fraud, and the presumption may be rebutted. Bump, Bankruptcy, p. 844; *Nary v. Merrill*, *supra*; *Tapley v. Forbes*, 2 Allen, 23; *Stevens v. Blanchard*, 3 Cush. 169; *Abbott v. Shepard*, 142 Mass. 18; *Toof v. Martin*, 13 Wall. 40.

The facts reported by the referee totally overcome this presumption of fraud, if found to exist.

The referee found that defendant "supposed his son had been doing a fairly profitable business."

It is not the purpose of the law relating to insolvency to prevent a creditor from collecting what is due him, but rather

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to encourage and make him vigilant in this respect, and whatever he fairly secures upon a meritorious claim or honest debt, he is entitled to hold. Bump on Fraud. Con. 187.

*L. M. Reed and Waterman & Martin*, for the plaintiff.

The principal question is as to the amount of the plaintiff's judgment. The statute, ss. 1860-1, R. L., provides that "the assignee may recover the property or the value thereof," etc. The purpose of the insolvent law is to provide for an equal distribution of the debtor's property. Bump, Bankruptcy, p. 815. The transfer was not in the usual and ordinary course of business. Bump, p. 817.

Reasonable cause to believe means a state of facts or circumstances which would lead any prudent man to make inquiries. "It will not do to ask protection on account of ignorance when a small amount of inquiry would have given all necessary information." Bump, Bankruptcy, 811, 812.

The defendant was put upon inquiry. Bump, 814, 815; 16 Wall. 577.

The opinion of the court was delivered by

VEAZEY, J. The referee finds every element of fact entitling the plaintiff to recover except one. He says: "I am not able to find as a matter of fact, upon the evidence, that the defendant had reasonable cause to believe his son was insolvent at the time of the transfer of said notes." Then he submits to the court, as matter of law, to determine whether the facts found should have put the defendant on inquiry. It is plain that if the defendant had made inquiry he would have found that his son was insolvent. Was he put upon inquiry? This must be determined upon all the facts reported. One fact found, viz., that the transfer was not made in the usual course of business, was by the statute *prima facie* evidence of fraud (sec. 1861, R. L.), but not conclusive. Another fact known to the defendant, that his son, the debtor, had sold out his business, his entire stock, to one person, is also *prima facie*

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evidence of fraud. *Walbrun v. Babbitt*, 16 Wall. 577. Either of these facts were doubtless sufficient, unexplained, to entitle the plaintiff to a recovery. The question is whether the referee has reported other facts which relieve the transaction of the fraudulent aspect imported by these adverse facts, so that, as a prudent man, charged, as he was, with knowledge of the insolvent law, he was bound to make inquiry, which would have disclosed the true condition.

The referee reports, as before stated, that he cannot find that the defendant knew his son was insolvent, or had reasonable cause to believe him insolvent. "He supposed his son had been doing a fairly profitable business, and was worth something above what he might owe." He held a mortgage as security for what his son owed him; but it does not appear how long it had rested on the property, and on application of his son, who told him he was going to sell out, he released the mortgage. Two or three days thereafter the son told the father that he had sold out to Wheeler, who had formerly been his partner, and handed him the notes in question, which the father took and applied on the debt against his son, which had been secured as aforesaid. This was done under peculiar circumstances, and without a word of inquiry by the father, or of explanation or direction by the son.

These facts had some tendency to show that the father thought his son was financially sound, but the referee also finds that the defendant "made no inquiry of his son why he was going to sell out, and made no attempt to ascertain from him or Wheeler, or any other person, his son's financial condition."

Herein was the defendant's fault. He was bound to make inquiry. He had no right to rely upon his impressions up to the time of these transactions of unusual nature and out of the ordinary mode of transacting such business. The presumption or *prima facie* evidence of fraud arising therefrom could only be overcome by proof on the part of the defendant that he took the proper steps to find out the pecuniary condition of



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his son. He was bound to use all reasonable means, pursued in good faith, for this purpose. The *prima facie* evidence of fraud threw the burden of proof on the defendant to sustain the validity of the transactions. He chose to remain ignorant of what the necessities of the case required him to know. He thereby took the risk of the impeachment of the transactions by the assignee in insolvency in case his son should, within the time limited in the statute, be declared a bankrupt. These propositions are well sustained by authority. *Walbrun v. Babbitt, supra*, and cases there cited.

Judgment affirmed.

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JOSEPH H. HICKS' ESTATE v. MERRITT L.  
BLANCHARD.

*Attorney. Statute of Limitations. Date. Parent and Child.*

1. PRIVILEGED COMMUNICATIONS. The attorney of a client will neither be compelled, nor permitted, to disclose papers delivered, or communications made to him by his client, without his client's consent, when the validity of the claims described in the papers is in controversy; thus, the attorney who brought the suit was properly excluded from testifying in behalf of the defendant, that while he was the attorney of record for the plaintiff he furnished the defendant's agent a specification of the plaintiff's claim, which differed materially from the one on file in the case; and such agent was also properly excluded as a witness.
2. Under the statute,—R. L. s. 26,—which provides, that when time is to be reckoned from a day or date, or act done, such day, date, etc., shall not be included in the computation, the day, upon which a payment was made upon a promissory note, is excluded in determining whether the Statute of Limitations is a bar.
3. The plaintiff lived in the defendant's family, furnished some provisions and performed some labor, but the referee found that neither party expected that they were to be paid for, and that there was neither an express nor an implied promise; *Held*, that there could be no recovery.

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4. Payments, not made upon the general account, but to apply upon specific items, do not prevent the operation of the Statute of Limitations.
5. The manner in which an account is kept is unimportant in its bearing as to the operation of the statute; thus the plaintiff usually kept his account with the defendant on a large book and with apparent care; but during three months of one year he furnished feed for his horses, and at the same time the defendant delivered to him 140 lbs. of pork, and these items, both debt and credit, were kept on a diary, showing a balance due the defendant; *Held*, as there was no direction by the defendant, and no facts found by which the court could infer that he intended a different application, that the creditor could make the application upon any indebtedness of defendant.

ASSUMPSIT to recover upon a promissory note on an account.

Heard on a referee's report, March Term, 1887, POWERS, J., presiding. Judgment for the plaintiff to recover \$1,970.41.

This suit was brought by Joseph H. Hicks, who deceased in 1884, and it is now prosecuted by his executrix. As to items 9, 10, 11 and 12, it appeared that the defendant's wife was a daughter of Hicks, and that the plaintiff and his wife went to live with defendant, and took with them provisions, and performed some labor; and these items were for the provisions and labor.

It was found as to the testimony of H. W. Brigham and Stetson as follows :

“ The defendant called H. W. Brigham as a witness, who testified that in 1881 he was a practicing lawyer in this county, and brought this suit. The defendant's counsel then offered to prove by the witness that one N. L. Stetson, at the defendant's request, applied to the witness, while he was the attorney of record in the case for said Joseph H. Hicks, for a specification of the plaintiff's claim upon which the suit was brought; that the witness thereupon furnished said Stetson with a copy of the note in suit in the handwriting of the witness, and a copy of said Hicks' account in said Hicks' handwriting, which account materially differs from the plaintiff's specification on file in this case. To this evidence the plaintiff objected, and I excluded it, to which the defendant's counsel excepted.

“ Defendant's counsel asked the witness the following question : ‘ State whether or not, as counsel or agent of Joseph

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H. Hicks, in his lifetime, you furnished the defendant or his agent a copy of Hicks' account against the defendant in this case.' The question was objected to and excluded, to which the defendant's counsel excepted.

"N. L. Stetson was called as a witness, and defendant's counsel offered to show by him that at the defendant's request he called on said Brigham, while he was attorney of record for said Joseph H. Hicks, and asked him for a copy of the plaintiff's account and note; that Brigham said he had not got them then, but would obtain them from the plaintiff and bring them to him, and did so. Counsel offered the said copy of account in evidence, which, with the evidence offered, was objected to by plaintiff's counsel and excluded, to which the defendant excepted."

And as to the delivery of the 140 lbs. of pork, in part:

"I submit to the court as a question of law whether or not this diary account or the \$8.40 item therein, took said items 1 to 8 out of the Statute of Limitations. If it is a question of fact for me to determine whether or not any of said items of credit were intended by either party to apply on any other account than said account for feed, I find that they were not, aside from the \$8.40 for pork; and, as said Hicks had a large book on which he had kept in ink, and apparently written with care, certain items of debit and credit with the defendant, and did not enter thereon the \$8.40, I find from that fact that neither party understood that the \$8.40 was to apply in part payment of items 1 to 8, or that it had any connection with them. On said Hicks' large book are charged the first 7 items of the specification, the last of which is under date of December 15, 1871, and it contains certain credits which are on the specification, the last of which is under date of January 22, 1873."

The other facts are stated in the opinion.

*Waterman, Martin & Hitt*, for the defendant.

The action must be commenced within six years after the cause of action accrues. R. L. s. 959. When a part payment

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is made upon a promissory note, the debtor has no right to the *whole* day or the *remainder* of the day in which to pay the balance. The right of action for the balance is simultaneous with the first payment, and has its origin from that act; therefore the day of the act should be included in the computation. *Norris v. The Hundred of Gawry*, Hob. 139; *King v. Adderly*, Doug. R. 463; *Bellasis v. Hester*, 1 Lord Kaym. R. 280; *Glassington v. Rawlins*, 3 East, 407; *Castle et al. v. Burditt*, 3 D. & E. 623; *Clayton's Case*, 5 Rep. 1; *Osbourne v. Rider*, Cro. Jac. 135; *Price v. Hundred of Chewton*, 1 P. Wms. 437.

When we consider some of the American authorities it is somewhat difficult to adopt any reasoning that is entirely consistent with them all.

Let the line be drawn so as to include the day of the act when the party against whom the time runs is privy to the act, and excluding it when he is not a privy thereto; and the contradictory decisions that seemed to trouble Angell in his work on Limitations will mostly disappear. *Presbery v. Williams*, 15 Mass. 193; *Little v. Blunt*, 9 Pick. 488; *Atkins v. Sleeper*, 7 Allen, 487; *Perry v. Provident Ins. Co.* 99 Mass. 162; *Arnold v. U. S.* 9 Cranch, 120; *Priest v. Tarlton*, 3 N. H. 93; *Blake v. Crowningshield*, 9 N. H. 303; *Rand v. Rand*, 4 N. H. 267.

If a present vested right is to commence from a date, the day of the date is included, but if the date is merely to fix a terminus from which to compute, the day of the date is excluded. *Pearpoint v. Graham*, 4 Wash. (Cir. Co.) 232.

The 140 lbs. of pork was not delivered to apply on payment of items 1 to 8, and it had no connection with them. Neither party understood that it was so to apply. *Hodge v. Manley*, 25 Vt. 210; *Harris v. Howard*, 56 Vt. 695.

It was error to exclude the testimony of Brigham and Stetson. 1 Greenl. Ev. s. 244; *Earle v. Grout*, 46 Vt. 113; *Coon v. Swan*, 30 Vt. 6.

*S. T. Field*, for the plaintiff.

The testimony of Brigham was rightly excluded. 1 Greenl.

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Ev. ss. 186, 237, 240; *Briggs v. Hodgdon*, 3 New Eng. Rep. 282. Much more so was that of Stetson. *Parmeter v. Coburn*, 6 Gray, 509; *Collins v. Stephenson*, 8 Gray, 438.

The action was seasonably commenced. The day upon which the cause of action accrued is to be excluded from the computation. *Blackburn v. Nearing*, 43 Conn. 56; *Weeks v. Hull*, 19 Conn. 381; *Bigelow v. Wilson*, 1 Pick. 487; *Paul v. Stone*, 112 Mass. 27; *Bemis v. Leonard*, 118 Mass. 502 and cases cited; *Cornell v. Moulton*, 3 Denio, 12; *McGraw v. Walker*, 2 Hill (N. Y.) 404, 508; *Owne v. Slater*, 26 Ala. 547; *Warner v. Slade*, 23 Mich. 1; *Menges v. Frick*, 73 Penn. St. 137; Angell on Lim's, Ch. 6 and cases cited; Wood on Limitations, Ch. 5; *Robinson v. Robinson*, 32 Vt. 738, 740; *Muzzy v. Howard*, 42 Vt. 23; *Pellow v. Wonford*, 9 Barn. & Cress. 134; *Hardy v. Ryle*, 9 Barn. & Cress. 603; *Williams v. Burgess*, 11 Ad. & Ellis, 635.

On the facts reported, the Statute of Limitations is not a bar. *Penniman v. Rotchm*, 3 Met. 216; *Abbott v. Keith*, 11 Vt. 525, 529; *Hodge v. Manley*, 25 Vt. 213, 214; *Davis v. Smith*, 4 Greenl. 337, 340; *Davis v. Smith*, 48 Vt. 52, 57; *Plimpton v. Gleason*, 57 Vt. 606, 607; *Chapman v. Goodrich*, 55 Vt. 356; *Robie v. Briggs*, 59 Vt. 443; *Elbridge v. Smith*, 44 Mass. 35, N. E. R. Vol. 4, 180, 186; *Cogswell v. Dolliver*, 2 Mass. 221; *Norton v. Lasso*, 30 Cal. 126; *Kimball v. Kimball*, 16 Mich. 211; *Wilson v. Calvert*, 18 Ala. 274; *Brackenridge v. Baltzell*, 1 Carter (Ind.) 333; S. C. 13 U. S. Digest, 469.

The opinion of the court was delivered by

ROYCE, Ch. J. This was an action of assumpsit in which the plaintiff claimed to recover the amount appearing to be due upon the promissory note and account described in his specification. The defence relied upon was the Statute of Limitations.

The evidence of the witnesses, Brigham and Stetson, was rightfully excluded. Brigham was the attorney of record of

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the plaintiff and brought this suit. While he was acting as such attorney he came into possession of the note in controversy and the plaintiff's specification of his claim, and the defendant offered to prove that he obtained a copy of said specification from said Brigham, and to use the same as evidence. The relations that subsisted between the plaintiff and Brigham were such that Brigham was not at liberty to allow papers which had come into his hands as the plaintiff's attorney to be used as evidence in a suit in which the validity of the claims described in said papers was in controversy. They were what the law designates as privileged communications. And the rule in relation to them is stated in Greenleaf on Evidence, sec. 237, Stephen's Digest of the Law on Evidence, art. 115, and 1 Phillips' on Evidence, 116, to be that the attorney of a client cannot be compelled to disclose papers delivered to him or communications made to him by his client; neither will he be permitted to do so without the consent of his client.

The note described was dated the 21st of September, 1867, and made payable on demand, and the last payment made and indorsed thereon was made on the 5th of November, 1874. The writ was dated November 5, 1880, and was served on the 23d of February, 1881; and it is claimed the action was not commenced within six years after the payment made upon the note; that the day upon which the payment was made is to be reckoned in determining when the six years would run within which the action should have been commenced; and that by reckoning that day more than six years had elapsed from the date of the payment to the commencement of the action.

How that question might be decided, if it was to be governed by the authorities which the industry of counsel has brought to our attention, we do not feel called upon to decide. For, in our judgment, the statute defining when the action must be commenced, must be construed by the direction given in chap. 1 of the Construction of Statutes, sec. 26, which provides that when time is to be reckoned from a day or date, or

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act done, such day, date, or day when such action is done should not be included in the computation. So that, construing the statute as thereby directed, the date of the payment is to be excluded in computing the time when the action might be commenced, and by excluding it the action was seasonably brought. That view disposes of the attempted defence to the right of recovery upon the note.

The remaining question relates to the plaintiff's right to recover for the account described in his specification.

There can be no recovery for items 9, 10, 11 and 12; for the referee has found that the services rendered and provisions furnished which constitute these items were not rendered or furnished under circumstances that raised a promise, express or implied, that they were to be paid for, and that neither party expected they were to be paid for, and that they were never charged in any book. So the right to charge them never existed.

Both parties understood that the first seven items of the account were to be paid, and they, with number 8, were regularly entered on the plaintiff's book.

The services charged for in item number 13 were rendered under an agreement that the plaintiff was to receive therefor a certain sum quarterly, and the sum agreed to be paid at the end of each quarter was paid as agreed and no charge was ever made by the plaintiff for the same. The services rendered under that contract and the payments received therefor were not intended to enter into the general account between the parties and were not so treated by the parties, as is evident from the fact that no charge was ever made for the same. "Payment of specific items of charge, unaccompanied by any circumstances showing a recognition of any other account, will not be sufficient to remove the operation of the statute." *Hodge v. Manley*, 25 Vt. 210; *Harris v. Howard's Estate*, 56 Vt. 695. What has been said to that item applies also to item number 14.

In October, November and December, 1878, the plaintiff

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furnished feed for the defendant's horses and paid for shoeing them, and kept an account of the same in his diary, but not on the book on which his other account with the defendant was kept. The defendant paid him from time to time different sums, and intended to keep him reimbursed for such expenditures, and the plaintiff gave him credit on said diary for what he so paid him. It is not found that any contract was made as to how or when the plaintiff was to be compensated for such expenditures.

In November, 1878, the defendant delivered to the plaintiff 140 lbs. of pork at \$8.40, which overpaid the charges of the plaintiff for this expenditure for the defendant \$7.45. No direction was given by the defendant as to where it should be applied, and no application of it has been made except by the credit given for it in the plaintiff's diary. It is claimed by the plaintiff, that the delivery of the pork and its receipt by him under the circumstances detailed removed the effect and operation of the statute from all previous charges, and that the statute commenced running thereon from the date of its credit; that any new item of credit which the defendant pays with a view to lessen that balance is equivalent to a new promise to pay what remains and removes the statute bar, as was held in *Hodge v. Manley*, *supra*, and *Abbott v. Keith*, 11 Vt. 525.

The referee has found from the fact that the plaintiff had a large book, kept with apparent care, and did not enter thereon the item for the pork, that neither party understood that it was to apply as part payment of the first items of the account, or had any connection with them. It has been frequently held that the manner in which an account is kept is unimportant. *Abbott v. Keith*, *supra*. It is a proper subject as evidence to be considered by the trier as bearing upon the good faith and honesty of the account. But the true inquiry is, whether the item represents a legal indebtedness that should go into the account of the parties, and not whether either party has or has not embraced it in his account. *Davis v. Smith*, 48 Vt. 52. It is found that the pork was not intended as a gift, and if not



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so intended, the plaintiff became legally liable to account for it, and being so liable, it became a proper subject to be entered in his account with the defendant, and to be adjusted in their final settlement. If there had been a direction given as to its application, or facts had been found from which the court could infer that a different application was intended by the defendant, the question might merit a different consideration.

The case stands for judgment as it would if the defendant had paid to the plaintiff a sum of money with no evidence as to the application to be made of it, except the manner in which the plaintiff kept his account of it. In such a case the law is too well settled to require the citation of authorities that the creditor has the right to make the application upon any indebtedness of the debtor. Here there was no other indebtedness shown except upon the account, and the creditor had the right to treat the delivery of the pork as a payment upon that account; and so treating it, it removed the effect and operation of the statute from all previous charges, so that the statute commenced running from the date of that payment. Every new item of credit or part payment is an acknowledgment of an open unliquidated account, and equivalent to a new promise to settle and pay the balance thereon due. *Hodge v. Manley, supra*. Such being the legal effect of the payment made by the defendant, the statute is not a bar to a recovery for the balance of the account.

Judgment affirmed.

LEMUEL SMITH AND EMILY A. SMITH, HIS WIFE,  
v. THE NIAGARA FIRE INSURANCE COMPANY.

*Insurance. Agent. Waiver.*

1. PRACTICE. Error will not be found in an unanswered question put to a witness.
2. PRESUMPTION. The payment of a mortgage note is not presumed until fifteen years have elapsed after the note had matured.
3. An undischarged mortgage, which has been paid, is not an incumbrance on property insured.
4. WARRANTY. The assured warranted that they had "not omitted to state to the company any information material to the risk." At the time the insurance was taken there was an undischarged mortgage on the property, but the mortgagee had voluntarily destroyed the note secured by it, which was not known by the assured; *Held*, that a failure by the assured to state that they believed that the property was mortgaged was an omission of a statement material to the risk; or, at least, it was evidence from which that might have been found. And if it was a question of law, a verdict should have been ordered for the defendant; if of fact, it should have been submitted to the jury with proper instructions.
5. AGENT. A general agent of an insurance company, who has a supervision of all its affairs, unless restricted in his power, and this is known to the plaintiff, has authority to waive a statement of the loss, although by the terms of the policy that was a condition precedent to recovery.
6. But a local agent, who never had been held out by the company as possessing any authority, except to receive proposals for insurance, fix rates of premium and issue policies, has no power to waive the condition of a policy requiring a statement of loss; and there was error in the charge, when the jury were at liberty to find a waiver from the declarations of either the local or general agent.
7. WAIVER. But the general agent cannot waive the statement of loss in a manner other than that provided for in the policy; thus, he cannot give an oral consent to a waiver, when by the terms of the contract the waiver must be indorsed on the policy.

ASSUMPSIT upon an insurance policy. Plea, general issue.  
Trial by jury, September Term, 1887, Ross, J., presiding.  
Verdict for the plaintiffs.

The application for said insurance was in writing, dated

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July 14, 1886, signed by the said Emily A. Smith, and contained the statement that there was no incumbrance upon the property.

Said application also contained the following clause: "And I hereby covenant and agree that the foregoing statement, valuation, description and survey are true and correct; and they are submitted as my warranty and a basis for the desired insurance. The company shall not be bound by any act done or statement made to, or by any agent, or other person, which is not contained in the application; and this application shall be deemed and considered a part of the policy to be issued hereon, and bearing even number herewith."

The policy of insurance issued upon the foregoing application was written by Messrs. Cudworth & Childs, defendant's agents, located at Brattleboro, is dated July 16, 1886, numbered 5219.

Immediately succeeding the fire the plaintiffs notified Messrs. Cudworth & Childs of the loss; and in a few days thereafter Mr. Cudworth, in company with Mr. Henry R. Turner, the defendant's general agent, having the supervision of all the company's affairs and its adjuster of losses, within and for the New England states, visited the premises, examined the property damaged by the fire, and the schedule of property destroyed therein which the plaintiffs had prepared in anticipation of said adjuster's visit.

The evidence of the plaintiff tended to show that at this visit they furnished Mr. Turner with such knowledge and information as they then had relative to the origin and circumstances of the fire, and also agreed as to the amount and value of the property damaged and destroyed as shown by the said schedule in writing furnished as aforesaid; that owing to the fact that rumors were afloat in that community in regard to said fire being of an incendiary origin, and with which the plaintiffs' names were connected, Mr. Turner desired to make some further inquiry before making a final adjustment; that plaintiffs requested Mr. Turner to make a full and thorough

examination, and satisfy himself as to the cause and origin of the fire; that they were ready and willing to make a sworn statement relative to said fire and the property damaged and destroyed, which, in their opinion, when made, would be much greater in amount and value than was shown by said schedule.

Against the objection and exception of the defendant, both of the plaintiffs were permitted to testify that on the occasion of the aforesaid visit, and in reply to their declaration of a willingness to make a sworn statement, Mr. Turner said to them that he was satisfied that property to the full amount of the insurance had been destroyed, and that no statement in writing, sworn to, was required of them, and that he would see them again relative to said adjustment in a very short time; that when Mr. Turner left he carried away with him the schedule of property which plaintiffs had prepared as aforesaid, and upon which the valuations agreed as aforesaid had been carried out. The plaintiffs did not again see Mr. Turner until July, 1887, and after suit was brought.

The defendant insisted that the plaintiffs were not entitled to recover, and that a verdict should be directed for the defendant for the following reasons:

1. Because the property was incumbered by the mortgage to Orinda Eames of July 2, 1870, to the amount of \$800, to secure the note of that amount payable in five years from the date last aforesaid, which said note and mortgage has never been paid and discharged.

2. Because at the time the application for the insurance was made, and upon which the defendant company issued the policy upon which this suit is brought, she, the said plaintiff, represented that the property insured was not incumbered, when in fact the plaintiffs had executed the mortgage aforesaid, and had not paid the same, and had no reason to believe but what said mortgage was a valid and subsisting claim and mortgage at the time said application for insurance was made.

3. Because the plaintiffs did not render to the defendant, within thirty days after the fire, a particular statement of the loss, signed and sworn to by the assured, as is required by

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paragraph 3 of the 6th subdivision of the policy and contract of insurance. And, further, that the jury should be charged that the rendering of such a statement, sworn to by the assured, was a condition precedent to the plaintiffs' right to recover.

4. That to constitute a waiver, or in other words, to justify the jury in finding that the defendant had waived the requirement of proof of loss, as specified in the policy, they must be satisfied that such requirement was waived by a party having authority so to do, and that such party intentionally and understandingly relinquished a well-known right—that is, the performance of a condition which the company had a right to insist upon.

The following was a part of the policy :

“ WARRANTY OF THE ASSURED.

“ The assured, by the acceptance of this policy, hereby warrants that any application, survey, plan, statement or description connected with procuring this insurance, or contained in, or referred to in this policy, is true, and shall be a part of this policy ; that the assured has not overvalued the property herein described, nor omitted to state to this company any information material to the risk ; and this company shall not be bound under this policy by any act of, or statement made to, or by, any agent or other person, which is not contained in this policy or in any written paper above mentioned.

It is also a part of this warranty that if this policy shall be continued by renewal it shall be considered as continued under the original representations ; and that any change in the risk, not made known to this company at the time it is so continued shall render this policy void.”

*Haskins & Stoddard*, for the defendant.

The court should have ordered a verdict for the defendant, as requested. The plaintiffs should have disclosed the incumbrance on the property. It was a material fact.

In the *Columbian Ins. Co. v. Lawrence*, 2 Pet. 25 (Curt. Ed. 10), MARSAALL, Ch. J., says : “ The contract of insurance is one in which the underwriters generally act on the representation of the assured, and that representation ought con-

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sequently to be fair, and to omit nothing which it is material for the underwriters to know. \* \* \* Fair dealing requires that he should state everything which might influence, and probably would influence, the mind of the underwriter in forming or declining the contract." s. c. 10 Pet. 507. The above is approved in *Farmers M. F. Ins. Co. v. Marshall*, 29 Vt. 23. The statements of the plaintiffs by the application were express warranties. May on Insurance, s. 156; *Boardman v. N. H. Ins. Co.* N. H. 551; *Hayward v. N. E. Mut. F. Ins. Co.* Cush. 444; *Towne v. Fitchburg Mut. F. Ins. Co.* 7 Allen, 51; *Campbell v. N. E. Mut. F. Ins. Co.* 98 Mass. 381.

It is the duty of assured to disclose all material facts. *Vose v. Ins. Co.* 6 Cush. 42; *Patten v. Ins. Co.* 38 N. H. 338; *Daniels v. Ins. Co.* 12 Cush. 425. The assured furnished no proofs of loss. The furnishing such proofs was a condition precedent to a right to recovery. *Donahue v. Windsor Co. M. F. Ins. Co.* 56 Vt. 374; *Findeisen v. Ins. Co.* 57 Vt. 520.

The local agent was not empowered to waive the conditions of the policy. *Barrett v. Union Mut. F. Ins. Co.* 7 Cush. 175; *Worcester Bank v. Hartford Fire Ins. Co.* 11 Cush. 265; *Hale v. Mechanics Mut. Fire Ins. Co.* 6 Gray, 169; *Kimball v. Howard Fire Ins. Co.* 8 Gray, 37; *Tate v. Citizens Mut. Fire Ins. Co.* 13 Gray, 79; *Shamut Sugar Refin. Co. v. Peoples Mut. Fire. Ins. Co.* 12 Gray, 535; *Harrison v. City Fire Ins. Co.* 9 Allen, 231; *Lohnes v. Ins. Co. of North America*, 121 Mass. 439; *Kyte v. Commercial Union Ass. Co.* 144 Mass. 43; *Putnam v. Fitchburg Mut. Fire Ins. Co.* vol. 5 N. E. R. 289.

A waiver of the condition relating to the furnishing proofs of loss, to be effectual, must have been in writing and indorsed upon said policy. *Mulrey v. Shamut Mut. Fire Ins. Co.* 4 Allen, 116; *Worcester Bank v. Hartford F. Ins. Co.* 11 Cush. 265; *Hale v. Mechanics Mut. Fire. Ins. Co.* 6 Gray, 169; *Kyte v. Commercial Union Ass. Co.* 144 Mass. 43; *Putnam Tool Co. v. Fitchburg Mut. Ins. Co.* vol. 5 N. E. R. 289; *Cleaver v. Traders Insurance Co.* 8 N. W. R. 816.

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*Waterman, Martin & Hitt* and *S. T. Davenport*, for the plaintiffs.

The mortgage was extinguished as an incumbrance, when the note was destroyed. *Briggs v. Fish*, 2 D. Ch. 100; *Seymour v. Darrow*, 31 Vt. 122; May Ins. s. 292; *Hawkes v. Ins. Co.* 11 Wis. 188; *Merrill v. Ins. Co.* 73 N. Y. 452.

The defendant was not injured by the statement that there was no incumbrance; and it was in fact true. Mrs. Eames could have been compelled to discharge the mortgage. *Ring v. Ins. Co.* 54 Vt. 434; *Brink v. Ins. Co.* 49 Vt. 442.

After the lapse of fifteen years, there was a presumption of payment. *Whitney v. French*, 25 Vt. 663. Turner was the defendant's general agent. Clothed with this unlimited authority he went on and adjusted the loss. No restriction in the policy as to the acts of the company's agents could affect him. He was the company for all purposes connected with the adjustment of losses. May Ins. s. 151.

An agent may act within the general scope of his real or apparent authority. Wood Ins. s. 383. In all cases the binding force of an act done or omitted by an agent, is to be measured by his apparent authority, and is to be determined by the jury. Wood Ins. 681, s. 403; May Ins. s. 509.

Plaintiff might fairly infer from what had taken place that if Cudworth said anything about it he would speak for the company he represented. May Ins. ss. 152, 143. Cudworth's authority as agent was a question for the jury. His power of attorney from the company was simply a matter between him and the company. Wood Ins. s. 391; May Ins. 154. See *Boutelle v. Ins. Co.* 51 Vt. 4.

Whether or not there has been a waiver is always a question of fact for the jury. *Findeisen v. Ins. Co.* 57 Vt. 520; *Donahue v. Ins. Co.* 56 Vt. 374; *Mosley v. Ins. Co.* 55 Vt. 142. Turner and Cudworth had authority to waive the sworn statement. Wood Ins. s. 395. The only objection or question raised by Turner, after being furnished a schedule, and agreeing upon the values, being as to the origin of the fire,

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constitutes a waiver of all other objections. *Brink v. Ins. Co.* 80 N. Y. 108; *Goodwin v. Ins. Co.* 73 N. Y. 480; *May Ins. ss.* 468, 470; *Wood Ins.* 715, 718, 723; *Walsh v. Ins. Co.* 54 Vt. 351; *Mosley v. Ins. Co.* 55 Vt. 142; *Ins. Co. v. Wilkinson*, 13 Wall. 232; *Brink & Co. v. Ins. Co.* 49 Vt. 442. If the agent of an insurance company, after an examination of the circumstances attending the loss, informs the insured that he cannot recommend the company to pay the loss because it appears by his statement that he has sold more goods than he had purchased, this is a denial of all liability on the part of the company and a waiver of its right to demand the usual proofs of loss. *May Ins. s.* 505; *McBride v. Ins. Co.* 2 Ins. L. J. 271.

Limitations in policies upon the authority of agents to waive any conditions therein, refer to that part of the policy properly termed conditions essential as a part of the contract, but not to those stipulations to be performed after loss, such as furnishing a sworn statement. *May Ins. ss.* 511, 473, and cases cited.

The opinion of the court was delivered by

TART, J. I. The defendant objected to an inquiry of a witness upon the subject of damages. Conceding the question to have been improper, the exceptions do not show that it was answered. To avail the defendant, it must so appear, and that the answer was prejudicial to it. *Carpenter v. Corinth*, 58 Vt. 214.

II. The assured warranted that there was no incumbrance upon the property. There was then upon record, an undischarged mortgage for eight hundred dollars, with accrued annual interest for sixteen years. The plaintiffs claimed that the presumption of payment applied, fifteen years having then elapsed since the date of the note and mortgage. The note matured in July, 1875, and it was at the latter date that the fifteen years began to run, so as to afford a presumption of payment from lapse of time. The fifteen years have not yet expired, the presumption, therefore, did not arise.



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III. Was the undischarged mortgage an incumbrance within the meaning of an insurance contract? It has sometimes been so held,—*Warner v. Middlesex Mut. Ass. Co.* 21 Conn. 444; *Muma v. Niagara, etc., Ins. Co.* 22 U. Can. (Q. B.) 214,—but we think the doctrine generally prevails, that if the mortgage debt has been paid, the undischarged mortgage is not an incumbrance,—*Merrill v. Agril Ins. Co.* 73 N. Y. 452; *Hawkes v. Dodge Co. M. Ins. Co.* 11 Wis. 188, as cited in *Bates Dig. Fire Ins. Dec.* 256, and we so hold.

IV. The assured warranted that they, at the time of the contract, had “not omitted to state to the company any information material to the risk.” The undischarged mortgage was held by Mrs. Eames, and she had prior to that time, secretly and voluntarily destroyed the note, but the assured had not been informed of that fact, so that they must have believed that the mortgage debt was then a valid subsisting lien upon the property. No payment had been made on either the principal or interest. The more important question in respect to the mortgage is, whether the failure to state to the company that they believed the property was mortgaged was not an omission to state information material to the risk. Statements as to incumbrances are material; they are made so by the policy; they have regard to the risk. The object of inquiry in respect thereto, is to ascertain the interest of the applicant in the property, so that the insurer can take into consideration the interest the applicant has in its preservation. He may have none, so that fire may occur from his neglect, or his active participation in its origin. The value of the property burned as found by the jury was eight hundred and thirty-seven dollars; it was insured for thirteen hundred and fifty, nine hundred upon the buildings, the remainder upon their contents. The real estate was mortgaged for more than sixteen hundred dollars, as the plaintiffs then believed. Had the mortgage debt still existed, the statute barred any recovery upon the notes, and the policy was not payable to the mortgagee in case of loss. If the buildings did not burn, the property would be

held by the mortgagee ; if they did, the assured would receive their value as the avails of the policy would belong to them. The moral hazard was exactly the same if they believed the property mortgaged, as it would have been, had the mortgage in fact existed. We think that when they failed to state the fact that they believed the property was mortgaged, they omitted to state information material to the risk, at least their failure was evidence from which that fact might have been found. We have no occasion to pass upon the point of whether this was a question for the court or jury. If it was a question of law, the court should have complied with the second request ; if of fact, it should have submitted it to the jury with proper instructions. The question under the claim of the defendant and the evidence, was in the case, should have been disposed of either as one of law or fact, and was saved by the exception to the charge raised by the second request.

V. By paragraph three of the sixth condition of the policy it was the duty of the assured in case of loss, to furnish the defendant, within thirty days, a statement of the loss, signed and sworn to. It is conceded that no statement was furnished. It was a condition precedent to a recovery, as it was so provided by the terms of the policy. *Donahue v. Ins. Co.* 56 Vt. 374. That the proofs of loss may be waived by the company is unquestioned. *Findeison v. Metropole Ins. Co.* 57 Vt. 520. The plaintiffs claimed upon trial that the proofs of loss were waived ; the jury so found. The evidence upon which this finding was based was the testimony of the plaintiffs, as to the declarations of Turner and Cudworth, who, as the plaintiffs claim, were acting as the agents of the defendant. Turner was the general agent of the defendant, having supervision of all its affairs, and its adjuster of losses ; and unless restricted in his authority, the plaintiffs having notice thereof, we think had all the power of the company, in the settlement of a loss, to waive any of the conditions of the policy.

VI. Cudworth was the local agent of the company with

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power to receive proposals for insurance, fix rates of premiums, and issue policies. It does not appear that he was ever held out by the defendant as possessing any other authority or ever acted in the settlement of losses. We think he had no authority to waive that condition of the policy requiring a sworn statement in the settlement of a loss, although he might unless restricted, waive conditions concerning the issuance of a policy, or anything apparently within the scope of his authority, in the business committed to him. We recognize the full force of the rule as to the liability of the principal for the acts of an agent, as stated in *Ins. Co. v. Wilkinson*, 13 Wall. 222, "that the powers of an agent are *prima facie*, co-extensive with the business intrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals." The settlement of losses was no part of the business of Cudworth; he was not for that purpose the defendant's agent. *Bowlin v. Hekla Fire Ins. Co.* (Minn.) 16 Ins. L. J. 305; *Kyte v. Commercial Un. Ass. Co.* (Mass.) *ibid.*, 330. The jury were at liberty under the charge, to find a waiver from the declarations of either Turner or Cudworth. If they found it from those of the latter, it was error, as he possessed no authority to waive a sworn statement; and as the waiver may have been found from the illegal testimony, there was error in this branch of the case, irrespective of the question of the authority of Turner.

VII. Having held that Turner had authority to waive any condition of the policy, the question remains whether he could do so save in the manner provided by the contract. One condition of the policy is that no officer, agent or representative of the company should be held to have waived any of the conditions of the policy unless such waiver was indorsed on the policy. This provision was a valid one, binding upon the parties, and effect should be given to it. While the defendant could give its *oral* consent to a waiver of the statement, no officer, agent or representative could consent unless the consent was indorsed on the policy. This point we think well taken. In *Carriagan*

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v. *Ins. Co.* 53 Vt. 418, the contract provided that *no agent* was empowered to waive any of its conditions without special authority, etc., and it was held that this term referred to local agents, not general ones, and the case notes the distinction between the two; here the limitation is upon the authority of any officer, agent or representative. If Turner was not an officer, he was certainly a representative, and his want of authority to waive any condition unless by writing, indorsed on the policy was brought to the knowledge of the plaintiffs by the contract itself; and where an agent's acts are in excess of such authority the principal is not bound. *Ins. Co. v. Wilkinson, supra*; *Packard v. Dorchester M. F. Ins. Co. (Me.)* 15 Ins. L. J. 475.

Where an agent has apparent authority to do an act, his principal is bound, and if the latter claims that the act is in excess of the agent's real authority he should show actual notice to the party with whom he deals. In the case at bar the law presumes notice; it is a part of the contract, the plaintiffs agreed to it. Why should they be released from their agreement?

In *Walsh v. Hartford Fire Ins. Co.* 73 N. Y. 5, the court were called upon to meet a question similar to the one involved here, and they said: "The company could itself dispense with this condition by oral consent as well as by writing, and Carpenter (the agent), unless specially restricted, would have possessed, in this respect, the power of the principal. But the policy contains the provision that no agent of the company shall be deemed to have waived any of the terms and conditions of the policy unless such waiver is indorsed on the policy in writing. This is a plain limitation upon the power of agents, and can mean nothing less than that agents shall not have the power to waive conditions except in one mode, viz., by an indorsement on the policy. The plaintiff is presumed to have known what the contract contained, and the proof tends to the conclusion that this provision was brought to his notice. He saw fit, however, to accept the assurance of the

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agent that an entry in the register was sufficient. It is difficult to see how, upon the law of contracts and agency, the plaintiff can recover. The entry in the register was not an indorsement on the policy. The oral consent was an act in excess of the known authority of the agent. The provision was designed to protect the company against collusion and fraud, and the dangers and uncertainty of oral testimony. The case seems to be a hard one for the plaintiffs; but courts cannot make contracts for parties, nor can they dispense with their provisions."

The same court, in *Marvin v. Universal Life Ins. Co.* 85 N. Y. 278, in disposing of an analogous question, said: "Here the policy in plain terms denied to any agent, local or general, the power to waive conditions, reserved that authority solely to the 'head office,' and some officer of the company there, and gave notice to the assured upon the face of his policy of the existence of this restriction. Henkle therefore had no power to waive payment."

The same rule has been followed in Massachusetts. *Forbes v. Agawam M. F. Ins. Co.* 9 Cush. 470. In *Worcester Bank v. Hartford F. Ins. Co.* 11 Cush. 265, under a like limitation, an agent took the policy, made a memorandum on a book, and told the assured that it was the same as if indorsed on the policy; the court held that the policy was void. In *Hale v. Mechanics' M. F. Ins. Co.* 6 Gray, 169, the policy prohibited previous insurance without the consent of the president in writing; it was held that the policy was invalid, although the jury found an oral consent by the president. The same question arose in the late case of *Kyte v. Un. M. Ass. Com. supra.* After discussing the question of the agent's authority, the court said: "Even if the agent had the fullest authority, could the conditions of the policy be waived other than in the manner in which they provide for such waiver. The company, which has seen fit to prescribe that the terms and conditions of its policy shall only be waived by its written or printed assent, has prescribed only a reasonable rule to

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guard against the uncertainties of oral evidence, and by this the assured has assented to be bound." If in this case Turner, by consenting orally to a waiver of the proofs of loss, can estop the defendant from raising this defence, then the clause of the contract requiring the waiver of a condition to be indorsed on the policy is rendered nugatory. No one can successfully contend that the company has not the right to restrict the power of its agents; and when such power is limited, is there any good reason why such limitation should not bind the assured? The plaintiffs cannot rely upon their ignorance of the terms of their contract; certainly not in the absence of fraud, and none is claimed in this case. In the late case of *Cleaver v. Traders' Ins. Co.* 16 Ins. L. J. 744, the Supreme Court of Michigan conclude an opinion in a case involving the question, as follows: "When the policy of insurance, as in this case, contains an express limitation upon the power of the agent, such agent has no legal right to contract as agent of the company with the insured, so as to change the conditions of the policy, or to dispense with the performance of any essential requisite contained therein, either by parol or writing; and the holder of the policy is estopped, by accepting the policy, from setting up or relying upon powers in the agent in opposition to limitations and restrictions in the policy."

To bind the defendant by a waiver of the proofs of loss, it should have been indorsed on the policy.

Judgment reversed, and cause remanded.

## GENERAL TERM, OCTOBER, 1887.

[CONTINUED FROM PAGE 1.]

T. J. DEAVITT, ADMR OF BETSEY GIFFORD'S  
ESTATE, v. A. E. JUDEVINE AND OTHERS.*Mortgage.*

1. In case of several conveyances of parcels of land incumbered by a common mortgage the parcels are held to the duty of redemption in the inverse order of their dates; and this rule is applied in adjusting the rights of successive grantees. Thus, the owner of a farm with a mortgage on it conveyed the west half to one party by warranty deed and received pay therefor; *Held*, that as between them, the mortgage was shifted at the time of the severance on to the east half of the farm.
2. Such owner subsequently conveyed the east half to another party, whose title came to the orator's intestate; *Held*, that she took only the title of such owner incumbered with the whole mortgage, as she purchased with notice, and was bound to know the law of contribution. And the rule is not varied by the fact that the first purchaser executed a mortgage on his portion of the farm to the original owner to secure a loan of money; nor by the fact that the present owner of the west half took collateral security to make good his grantor's covenants.

BILL to foreclose a mortgage. Heard on the pleadings and a special master's report, March Term, 1887, Washington county, VEAZEY, Chancellor.

Decree that the bill be dismissed with costs. The bill was brought to foreclose the Davis mortgage, mentioned in the opinion of the court. The master found :

“ On the 3d day of February, 1860, P. G. Wood and Eunice Wood, who were the owners of lot No. 59 in the first division of lands in Wolcott, by their warranty deed of that date, conveyed said lot to E. M. Gifford and therein warranted that said premises were free from incumbrance except, as stated in said deed, a mortgage to Jacob Davis, which said Gifford was to pay, on which was due \$609. On the 17th of September,

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1864, said Gifford by warranty deed, in consideration of \$500 then paid to him by Joseph Gilchrist and his wife, Irena L. Gilchrist, conveyed to said Irena that part of said lot No. 59 which was west of the highway which ran north and south through said lot. On the 23d of November, 1865, said Gifford and his wife by warranty deed conveyed to Leroy Plummer and James T. Robbins that part of lot No. 59 which was on the east side of said highway. On the 21st December, 1865, said Plummer and Robbins by quit-claim deed conveyed the east part of said lot to Betsey Robbins, who afterwards married Ira Gifford. On the 21st of April, 1866, said Joseph and Irena Gilchrist mortgaged the west part of said lot to E. M. Gifford to secure the payment of notes then executed by them to said Gifford to the amount of \$400.

In 1868 said Gilchrist and wife being unable to redeem their premises from said mortgage to Gifford, who requested payment, agreed with the defendant, Judevine, that he should advance the money in their behalf and pay off the the Gifford mortgage and take a deed of the premises from Gifford and that said Judevine should hold said premises as his security for what said Gilchrist and wife should be owing him for said advances and other debts, and that they should have a right to redeem said premises upon payment of their indebtedness to Judevine. In pursuance of this agreement said Judevine advanced the money for them, and on the 15th of May, 1868, they deeded said premises by quit-claim deed to E. M. Gifford, but remained in possession the same as before with a right of redemption and they procured the discharge of the Gifford mortgage, and on the 29th of December, 1868, said premises were by warranty deed conveyed by Gifford to Judevine who shortly after gave Joseph Gilchrist a bond for a deed of said premises. Gilchrist and wife were informed by Gifford at the time he deeded the land that there was no incumbrance on the premises, and they had no knowledge that there was a subsisting mortgage on lot No. 59 in favor of Davis, until 1871, when they informed Judevine, and he brought a suit against Gifford upon a breach of the covenants in his deed and put a writ in the hands of one Bridgeman, a sheriff, who did not serve the writ, but without authority from Judevine took from Gifford as collateral security for Judevine's protection against the Davis mortgage, a note for \$756.58, dated January 3, 1871, and signed by I. J. Currier and Jennie R. Currier, and the sheriff, in behalf of said Judevine, executed a receipt



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to said Gifford. Two of the defendant's witnesses testified on cross-examination that they thought Betsey Gifford did not know of the Davis mortgage until it was foreclosed.

"Bridgeman thereupon delivered the note to Judevine and they both then thought the note was good, although the mortgage given to secure it was a second mortgage. At that time Gifford had no known attachable property sufficient to have enabled Judevine to have secured his claim by attachment. Judevine afterwards learned that the property mortgaged was not worth more than the amount of the first mortgage and has never been able to realize anything on the Currier note.

"In 1874 a suit was brought to foreclose the Davis mortgage in which suit said Judevine, Ira and Betsy Gifford and Joseph Gilchrist were made parties defendant, and a decree of foreclosure was rendered with a year's time for redemption. Shortly before the time for redemption expired under this decree the orator, who had been engaged by Ira and Betsey Gifford to assist them in raising the money to pay the amount required by this decree, saw Judevine and asked him in behalf of Mrs. Gifford if he would pay the amount of the Davis decree. This Judevine refused to do unless Mrs. Gifford could give him security therefor. The orator then asked him if he would pay one-half the amount of the decree or would realize upon the note turned out to him by Gifford or permit the orator to do so and have the proceeds applied upon the Davis decree; but Judevine refused to do either, saying that the Currier note was turned out to secure him. He offered to let the orator have the Currier note if he would discharge said Judevine from the Davis mortgage. Thereupon Betsey Gifford borrowed of one Cummings the sum of \$900 with which to pay up the Davis decree, and she and Ira Gifford executed to said Cummings their note for that sum, secured by a mortgage of her farm in Wolcott, which farm adjoined and included the easterly part of said lot No. 59, and on the second day of June, 1875, said Betsey Gifford paid up the Davis decree and costs, which then amounted to \$828.48.

"Judevine at first supposed he would have to contribute toward the payment of the Davis decree in proportion which the value of the west part of said lot bore to the value of the whole, and with this supposition placed a sum sufficient to pay the Davis decree in the hands of Davis' solicitor, under an arrangement with him that if the Giffords did not redeem, Davis, after the decree ran out, was to deed to Judevine.

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After Betsey Gifford redeemed, Judevine's money was returned to him. At the time he placed the money in the solicitor's hands he was advised by him that if there was sufficient value in the east part of lot No. 59 the west part would not have to respond toward the payment of the decree, and that the respective parts of the lot would be held liable in the inverse order of the deeds.

"Betsey Gifford died in 1875, and the orator was duly appointed administrator of her estate. When she and her husband executed the mortgage to Cummings there was a prior mortgage on the farm. (In 1876 said Cummings brought a suit against Ira Gifford upon the note he had executed, and judgment was obtained in said suit for the amount of said note and interest and costs, and execution was issued, and quite an amount of personal property belonging to Ira Gifford was sold thereon, but it did not realize enough to satisfy the execution.

"The Cummings note was presented to the commissioners of Betsey Gifford's estate and allowed; but the estate is insolvent unless the orator should prevail in this suit.) The above findings included between the brackets were found upon testimony objected to as being improper and immaterial by the orator.

"There was considerable conflict in the testimony as to the respective values of the east and west part of lot No. 59. The land on the east part comprised a large part of the tillage land of the Betsey Gifford farm, and extended to within about thirty or thirty-five rods of the farm buildings, but has no buildings upon it. On the land on the west side of the lot there is a house built in 1871, and a barn in 1864. I find that the value of the east side of lot No. 59 is \$1,000, and that the value of the west side is \$800."

*T. J. Deavitt*, for the orator.

The prior incumbrance should bear equally upon each portion according to its value,—the orator paying five-ninths and the defendants four-ninths. 2 Story, Eq. Jur. ss. 477, 1233; *Chittenden v. Barney*, 1 Vt. 28; *Payne v. Hathaway*, 3 Vt. 212; *Lyman v. Little*, 15 Vt. 576; *Gates v. Adams*, 24 Vt. 70; *Hollister v. York*, 59 Vt. 1.

To have the parcel of mortgaged premises last conveyed first charged with the incumbrance, the mortgagor must convey .

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with deeds of warranty, and the vendees must have notice of the prior incumbrance at the time of the conveyance. With such notice, the cases say, the last vendee will exact security of the mortgagor if necessary. The mortgagors first conveyed the equity of redemption to E. M. Gifford, who assumed and agreed to pay the Davis mortgage by words inserted in the deed. This created a personal liability of E. M. Gifford to pay the incumbrance. *Davis v Hulett*, 58 Vt. 90.

The purchasers from E. M. Gifford had no notice of the Davis mortgage for a long time after the sale.

When the westerly portion of lot No. 59 came back into the hands of E. M. Gifford from the Gilchrists in the way it did, it became liable for the Davis mortgage, and when it was deeded to Judevine, Judevine stepped into Gifford's shoes to allow the Gilchrists to redeem from him. E. M. Gifford had at that time the legal title to the westerly portion, with this debt, which he had made his own, resting upon it, and the most the Gilchrists claimed was an equity right to redeem.

Judevine did not use such diligence in collecting the collateral as the law requires. Am. L. Rev. of 1880, 704; *Roberts v. Thompson*, 14 Ohio St. 1; *Lamberton v. Windon*, 12 Minn. 232.

When Betsey Gifford paid the decree, in 1875, she became subrogated to the rights of the mortgagee, and entitled to the same interest on her debt as the mortgagee would be entitled to; and if her debt now exceeds the value of her portion of the mortgaged premises, under any rule she should be entitled to a decree for the excess.

*J. P. Lamson*, for the defendants.

This case calls for the application of the rule, that when premises that are subject to a mortgage are sold in separate parcels to several purchasers, as between such purchasers the several parcels shall be charged with the burden of such mortgage, in the inverse order of the time of alienation. *Lyman v. Lyman*, 32 Vt. 79; *Root v. Collins*, 34 Vt. 173.

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When Gifford bought the farm, and took his deed, and assumed the Davis mortgage (as the case finds he did), it is in law and equity the same as though he gave the Davis mortgage himself after he took his deed.

When Gifford sold to Gilchrist, if Davis had foreclosed the mortgage, and Gifford had redeemed, he could not have compelled Gilchrist to contribute. The orator's intestate stands no better than Gifford.

The opinion of the court was delivered by

POWERS, J. The rule is well settled in this State that in case of successive conveyances of parcels of land incumbered by a common mortgage, the parcels should be held to the duty of redemption in the inverse order of their dates. *Lyman v. Lyman*, 32 Vt. 79; *Root v. Collins*, 34 Vt. 173.

No confusion will arise in the application of this rule to the case at bar, if the order of events be carefully noted.

E. M. Gifford on September 17, 1864, owned lot 59, on the whole of which rested the Davis mortgage, which he had assumed to pay. On that day Gifford sold the west half of lot 29 to Gilchrist by warranty deed and received his pay in full. The effect of this severance of the lot and conveyance to Gilchrist was as between Gilchrist and Gifford to shift the burden of the Davis mortgage wholly from the west half to the east half which Gifford retained. Had the Davis mortgage been foreclosed in this posture of the title, Gifford's east half would first respond and the west half would be called on only in case the east did not make good the debt.

This equity that compels the half lot retained by Gifford when he conveyed the west half to Gilchrist to first respond to the Davis mortgage arises at the time of the severance of the land and by virtue of the severance. It was the primary duty of Gifford to pay Davis. This duty remained when he conveyed the west half to Gilchrist. Gifford gave Gilchrist a warranty deed which of itself was equivalent between the parties to a discharge of the Davis mortgage from the west half.

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November 23, 1865, Gifford conveyed by warranty deed the east half to Plummer and Robbins, the title to which has since come to the orator's intestate. When Plummer and Robbins bought the east half of Gifford, they obtained Gifford's title to that half precisely as Gifford held it. The record showed them the Davis mortgage on the whole lot and the conveyance by warranty deed of the west half by Gifford to Gilchrist. Hence, they bought with notice of the actual state of the title and were bound to know the law of contribution as between the east and west halves.

The order in which redemption from the burden of the common mortgage is decreed, being fixed by the dates of the several conveyances, will continue attached to the several parcels in the hands of successive grantees.

The rule is not varied in this case by the fact that in April, 1866, Gilchrist mortgaged the west half to Gifford to secure a loan of money. This mortgage had no relation to Gifford's deed to Gilchrist. It was an independent transaction. The west half retained its equitable exemption from the burden of the Davis mortgage precisely as it would had this mortgage run to a person who was an entire stranger to the title.

Judevine's title then to the west half is protected to the same extent as it was in the hands of Gilchrist.

The collateral security held by Judevine is not material. He took this to make good Gifford's covenants of warranty in Gifford's deed to him, and in a conveyance to which the orator's grantors were in no sense privies.

The decree below is affirmed, and the cause remanded.

SARAH K. CLARK v. J. Q. A. GLIDDEN AND  
OTHERS.

[IN CHANCERY.]

*License. Aqueduct. Estoppel. Fraud.*

1. **PAROL LICENSE.** A parol license to lay an aqueduct to a spring of water on one's land is irrevocable during the existence of the aqueduct; and a court of equity, on the ground of equitable estoppel, will protect the licensee in the use of the aqueduct; and will grant and continue an injunction restraining the owner of the spring from interfering with the aqueduct until its decay; for a revocation of the license would operate as a fraud.
2. And the licensee has the right to make such repairs on the aqueduct as may be necessary to keep it usable, but not such as in any just sense would amount to a renewal of the aqueduct.
3. **MISTAKE.** Where there was a misunderstanding between the parties and the oratrix supposed that she was to have the water for nothing, but the defendant understood that she was to pay him at least nominal rent, so that she would not acquire title by possession, and the master found that the right to take the water was worth \$3 per year, the injunction was continued on condition of payment of that sum.
4. It seems that, at law, the licensor may revoke his license at any time.
5. Distinction between a license and an easement stated.

**BILL IN CHANCERY.** Heard on the pleadings and a special master's report, September Term, 1886, POWERS, Chancellor. Decree for the oratrix; and that the injunction be continued in force during the existence of the aqueduct.

The case appears in the opinion of the court.

*S. C. Shurtleff*, for the defendants.

The oratrix claims that although she has not made out her case as claimed, still she has shown enough to amount to a parol license to lay the aqueduct and take the water; and that having laid the aqueduct at large expense, the license is irrevocable, and that she is entitled to an injunction prohibiting the defendants from interfering with the flow of water therein while the aqueduct lasts.

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In view of this claim, it becomes necessary to inquire whether this interest is an interest in lands, and whether it is based upon a valuable consideration. There is no claim that she paid any consideration for this right, and there is no doubt that it is an interest in lands. *Hall v. Chaffee*, 13 Vt. 150. The case of *Allen v. Fisk*, 42 Vt. 462, does not aid in the solution of the question. The decisions on this question are not uniform, Pennsylvania, Ohio, Indiana and Iowa holding parol licenses irrevocable, while most of the other states hold to the contrary. All of the decisions agree that the license is a justification for the acts done under the license.

The later decisions hold as follows: "The more recent decisions and the weight of authority are to the effect that, both at law and in equity, the doctrine that an executed license is irrevocable is confined to those licenses, under which, when executed, it cannot be claimed that any estate or interest in land passes, and to licenses which are given upon a valuable consideration." Gould, Waters, s. 323, p. 529; *Houston v. Laffee*, 46 N. H. 505; *Dodge v. McClintock*, 47 N. H. 386; *Hill v. Cutting*, 113 Mass. 103; *East Jersey Iron Co. v. Wright*, 32 N. J. Eq. 248; 2 American Leading Cases, 682-706; *Godd. Eas.* 901; *Morse v. Copeland*, 2 Gray, 302; *Josefa De Haro v. United States*, 5 Wall. 599.

In those states in which it is held that parol licenses are irrevocable, the decisions all rest upon the ground that the defendant is estopped by his conduct from revoking, and that it is a *fraud* upon the other party. If this doctrine is applied to the present case, no such facts are found as warrant an estoppel, much less that the defendant has acted in bad faith; he refused to convey the right by deed, never has been paid anything, and has expended time and labor in the belief that he was to be paid.

*J. P. Lamson*, for the oratrix.

The oratrix entered upon the land of the defendant and put down her aqueduct, by reason of a license given to her by the

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defendant. Therefore, the defendant had no right to disturb her in the use of the aqueduct until she had received the full benefit of the expenditure in putting it down.

The oratrix has expended \$400 on the aqueduct, with full knowledge of the defendant. He is estopped from interfering with the water until she had had the full benefit of the expenditure. *Allen v. Fisk*, 42 Vt. 462; *Prince v. Case*, 10 Conn. 375; *Benedict v. Benedict*, 5 Day, 469; *Sampson v. Burnside*, 13 N. H. 264; 7 N. H. 237; 24 N. H. 364; 21 N. H. 291; 11 N. H. 102; 8 East, 429; 7 Bingham, 682.

The opinion of the court was delivered by

TYLER, J. The material facts reported by the master are, that the oratrix and defendant owned adjoining farms in Cabot; that the oratrix was about to lay an aqueduct from a small and insufficient spring on her farm to her farm buildings, when she had a conversation with the defendant, in which he told her there was a good chance for her to take water from a large spring on his farm, about the same distance from the oratrix's buildings as her own spring. The defendant was making no use of the water and told the oratrix that it was not benefiting him and she might take it if she wanted it. The master finds that the parties understood they had made an agreement by which the oratrix was to take water from the defendant's spring, but that they misunderstood each other as to the terms of the agreement, the oratrix supposing she was to have the water for nothing, while the defendant understood that she was to pay him at least nominal rent, so that she would not acquire title by possession. No sum or price was named as rent. The oratrix had a ditch dug for her aqueduct, but before having the logs laid she saw the defendant again, and told him she would like some kind of a writing from him, but he, understanding that she desired a deed, declined to give it, saying that he required no writing, and that she could take the water just as well without as with one. The oratrix then had the aqueduct laid, one hundred rods of which ran through



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lands of the defendant. After the logs were laid the pressure of the water upon them was found so great that for a portion of the distance they had to be taken up and iron pipes laid in their stead. All this was done with the defendant's knowledge and consent. The entire expense of the aqueduct was four hundred dollars. The defendant constructed a fence around the spring for its protection and permitted the oratrix, without objection, to use the water for the space of three years, when he notified her that she must pay something for the use of the spring to prevent her getting title by possession. She replied she had already got it and refused to pay anything, whereupon the defendant cut off the water, which was the cause of this suit. It is further found that before the suit was brought the defendant conveyed his farm to the other two defendants, who are his sons, and who took the title thereto with full knowledge of the oratrix's claim to a right in the spring. It is also found that the right to take the water and to have the spring properly fenced by the defendant, together with a right to enter upon defendant's land to repair the aqueduct is worth fifty dollars, or an annual rental of three dollars; also, that the taking of the water by the oratrix was of no benefit or advantage to the defendant.

The oratrix put in her aqueduct and incurred large expense about the same, not as a trespasser, but by the defendant's license. It is insisted by her that the license, having been executed on her part, was either irrevocable or could only be revoked after she had received the full benefit of her expenditure. The defendant, on the other hand, claims that the right to the water of the spring was an interest in the realty, and that the doctrine that executed licenses are irrevocable is confined to those cases in which no interest in land passes, and to licenses that are given on a valuable consideration.

A license is defined to be an authority given to do some act or a series of acts on the land of another without passing any interest in the land. *Cook v. Stearns*, 11 Mass. 537; 1 Wash. Real Prop. 398. An easement is a right in the

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owner of one parcel of land, by reason of such ownership, to use the land of another for a specific purpose, not inconsistent with a general property in the owner; a right which one proprietor has to some profit, benefit or beneficial use, out of, in or over the estate of another proprietor. *Pomeroy v. Mills*, 3 Vt. 279; 2 Wash. Real Prop. 25.

The grant of an easement does not pass the realty to the grantee. It conveys an interest in the realty, it is true, but that interest consists of a right of use, like a way over land or a right of aqueduct or drainage through it, while the general property remains in the grantor. It is well settled that an easement must pass by deed or by prescription, while a mere license to do a particular act or a series of acts on the lands of the licensor may be by parol; and yet Washburne, page 398, says that a license may be, and often is, coupled with a grant of some interest in the land itself.

It is apparent that the distinction between an easement and a parol license cannot always be maintained either in respect to the extent of the privilege or its duration. In Kent's Com. vol. 3, page 592, it is said that the distinction is quite subtle, and that it becomes difficult in some of the cases to discern a substantial difference between them.

The defendant's spring of water was a part of his realty, and the right claimed by the oratrix is a right in the realty, together with an easement from the spring through the defendant's land to her own land. The question therefore is whether this license, resting wholly in parol, had any validity; whether it was revocable at any time at the defendant's option, even after the licensed act had been fully executed by the oratrix.

It is clear that an interest in land cannot be conveyed by parol, nor can an easement be created except by deed; Angell on W. C. ss. 168-173; that licenses which in their nature amount to the granting of an estate for ever so short a time are not good without deed; *Cook v. Stearns*, *supra*; *Hewlins v. Shippam*, 5 Barn. & Cress. 221; 7 Dowl. & Ryl. 783; and that a parol license, which, if given by deed, would

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create an easement, is revocable, although executed by the licensee. As was said by PARKER, Ch. J., in *Cook v. Stearns*, "A permanent right to hold another's land for a particular purpose, and to enter upon it at all times without his consent, is an important interest, which ought not to pass without writing, and is the very object provided for by the statute."

The defendant's counsel relies upon the above authorities, and upon the statement of the law in Gould on Waters, s. 323, that, "The more recent decisions and the weight of authority are to the effect that, both at law and in equity, the doctrine that an executed license is irrevocable is confined to those licenses under which, when executed, it cannot be claimed that any estate or interest in lands passes, and to licenses which are given upon a valuable consideration." In *Houston v. Laffee*, 46 N. H. 505, the court said that, "while it had been held that where a license became executed by an expenditure incurred, it is either irrevocable or cannot be revoked without remuneration, on the ground that a revocation would be fraudulent and unconscionable, yet the more recent decisions sustain the doctrine that the license is in all cases revocable so far as it remains unexecuted, or so far as any future enjoyment of the easement is concerned." REDFIELD, J., in his note to his opinion in *Hall v. Chaffees*, 13 Vt. 150, recognizes this to be the law.

The courts, both in this country and in England, have held variously upon this subject. As was said by the Vice-Chancellor in *The East Jersey Iron Co. v. Wright*, 32 N. J. Eq. 248, "The adjudications upon this subject are numerous and discordant. Taken in their aggregate they cannot be reconciled, and if an attempt should be made to arrange them into harmonious groups, I think some of them would be found to be so eccentric in their application of legal principles, as well as in their logical deductions, as to be impossible of classification."

In the case last cited it was held that a contract giving a

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party an exclusive right to dig ore in certain lands, no estate or interest in the lands being granted, is a license and not a grant or demise.

The Vice-Chancellor quotes from numerous cases wherein it is held that a license is a mere personal privilege; that even where money has been paid for it, it is revocable at law, at the pleasure of the licensor; that the death of either of the parties will terminate it; that even when under seal the licensor may revoke it at will; and when it affects lands a conveyance of them will revoke it. But he adds, "These rules do not, however, apply when an interest is coupled with the license, or an interest is created by an execution of the license." And he lays down the rule that, except in cases where it appears that the authority or privilege given has been so far executed that its withdrawal will amount to a fraud, a license, whether created by parol or by writing under seal, is always revocable.

The oratrix would be remediless by the strict rules of law. Is she entitled to equitable relief upon the facts reported?

In Angell on W. C. s. 318, it is said that in equity licenses executed are taken out of the Statute of Frauds, and that relief may be had in equitable tribunals by the licensee. This is not upon the ground that the right passes by parol license or agreement, but that where one party has executed it by payment of money, taking possession and making valuable improvements, the conscience of the other is bound to carry it into execution. The author cites the case in 2 Eq. Cas. Abr. 523, Pl. 3, where one party stood by and saw his watercourse diverted, and instead of preventing it encouraged the work, and afterwards brought his action at law. The defendant, on application to the Court of Chancery, obtained an injunction. A leading case is *Rerick v. Kern*, 14 Ser. & Rawle, 267, where it is held that an executed license, the execution of which has involved the expenditure of money or labor, is regarded in equity as an executed agreement for valuable consideration, and as such will be enforced, even when merely verbal and relating to the use or occupation of real estate.

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It is urged in this case that the defendant was not guilty of bad faith in interrupting the aqueduct. But it is not necessary that active fraud should be found. Relief must be granted, if at all, upon the ground that the oratrix laid her aqueduct by defendant's permission and at great expense, and that the revocation of the license operates as a fraud upon her. In the case of *Houston v. Laffee*, above cited, the court referred to several authorities to show that when the parties cannot be placed *in statu quo*, the court of equity will grant relief, as in any other case of part performance of a parol contract for the sale of land, upon the ground of preventing fraud. Judge REDFIELD, in the note before referred to, assigns the same ground for granting equitable relief, and in his opinion he says: "Doubtless, a parol license to flow water back upon land, when once executed, becomes irrevocable, to some extent, in equity, and this although it may be an interest in land."

In *Adams v. Patrick*, 30 Vt. 516, the defendant permitted the orators to dig a ditch from their mill through his land to take away the waste water from their wheel-pit, in consideration that they would build a substantial wall for him along the bank of the stream. In reliance upon this permission, the orators lowered their water-wheel, dug a ditch and incurred other expenses, and built a wall for the defendant, though not so substantial an one as was agreed. Some year and a half afterwards the defendant obstructed the ditch. Upon a bill being brought praying for a specific performance of the agreement, the court held that there had been a sufficient part performance to take the case out of the Statute of Frauds. In that case there was a consideration for the license, but the decision went on the ground that a revocation operated as a fraud on the orators. See *Stark v. Wilder*, 36 Vt. 752.

"Where one of the two contracting parties has been induced or allowed to alter his position on the faith of such contract to such an extent that it would be fraud on the part of the other party to set up its invalidity, courts of equity hold that the

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clear proof of the contract and of the acts of part performance will take the case out of the operation of the statute, if the acts of part performance were clearly such as to show that they are properly referable to the parol agreement." *Williams v. Morris*, 95 U. S. 444.

In this case there was a clear agreement between the parties that the oratrix should lay an aqueduct. They misunderstood each other only in regard to the consideration. We think the defendant is equitably estopped from interfering with the aqueduct during its existence. That should be the duration of the estoppel bar; and no use short of that would give the oratrix the full benefit of her expenditure.

In the earlier New Hampshire cases it was held that a license to build a dam or a bridge on another's land was irrevocable while the structures continued, but might be terminated by their decay. *Woodbury v. Parshley*, 7 N. H. 237; *Ameriscoggin Bridge v. Bragg*, 11 N. H. 102.

The case of *Allen et al. v. Fisk*, 42 Vt. 462, is similar in its facts to the present one. While the court held in that case that the defendant had the right of revocation, and that the contract between the parties was not sufficiently clear to warrant a decree for specific performance, yet, as the orators laid the aqueduct with defendant's permission, their right to receive the full benefit of their expenditure by the use of the first aqueduct while it lasted, before such revocation would take effect, was fully recognized. It was held that the orators had not a right, after notice of revocation, to lay another aqueduct, the first having decayed.

It seems that, at law, the licensor may revoke his license at any time, even after the licensed act has been executed; that a sale of the realty upon which the right rests is deemed to be an act of revocation; *Stephens v. Stephens*, 11 Met. 251; and that such license could not be enforced against the *bona fide* purchaser of the realty without notice. But when the licensor has stood by and allowed the licensee to perform acts and spend money in reliance on his license, a court of equity

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will interfere and protect the licensee in the use of the aqueduct until its decay, on the ground of equitable estoppel.

The decree of the chancellor is affirmed, and cause remanded under a mandate that the injunction remain in force so long as the present aqueduct lasts, with the right in the oratrix and her heirs and assigns, during that time, of repairing the same as may be necessary to keep it usable, but not with the right of making any repairs that shall in any just sense amount to a renewal of the aqueduct itself, on condition that the oratrix pay the defendant an annual rental of three dollars while the aqueduct continues, including three dollars for each year since it was laid.

RUTLAND COUNTY, JANUARY TERM, 1888.

[CONTINUED FROM PAGE 257.]

GEO. W. CHAPLIN AND OTHERS v. MARY HELEN  
DOTY AND OTHERS.

*Will.*

1. The following words in a will, "I give and bequeath the residue of my estate to my said granddaughter \* \* \* to be for the proper use and benefit of herself and heirs forever," convey an absolute estate, if used without limitation, and have the same effect as a grant in a deed to one and his heirs forever.
2. It is an elementary rule in the construction of wills, that an absolute gift will not be defeated by a subsequent repugnant clause, unless such clause is plainly a qualification or condition, evidently intended by the testator to be read as a part of the preceding clause.
3. The will gave an absolute estate to the testator's granddaughter, and there was added the following: "But if she shall not marry, or marrying shall have no issue living, then I give and bequeath to her the interest," etc.; and also the following: "But if my granddaughter shall die without lawful issue living, then I give and bequeath whatever may remain," etc., to other persons named. The legatee is married and has lawful issue. On a bill brought to obtain a construction of the will; *Held*, that the absolute gift was not qualified, as the events named did not happen; that the words "shall die without lawful issue living," mean "without having had lawful issue;" and that the granddaughter was entitled to the residue of the estate.

BILL in chancery for the construction of a will. Heard on the pleadings, ROWELL, Chancellor.

It was *pro forma* adjudged and decreed that by the true construction and meaning of the last will and testament of James McConnell, as set forth in said bill, it is the duty of the orators, as trustees, to keep the residue of the estate of said James McConnell, now in their hands, at interest with good and sufficient securities, during the natural life of said Mary Helen Doty, and pay to her annually the interest and income thereof; and at the death of the said Mary Helen Doty, if she leave lawful issue surviving her, pay said prin-



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cipal sum of said residue to her said issue; but if she dies without lawful issue surviving her, then said residue to be distributed, one-half to the heirs of George W. Chaplin, and the other half to the heirs of David A. Richardson; and the orators are directed to administer the trust reposed in them as to the residue of said estate in accordance with this construction of the said last will and testament of said James McConnell.

The case appears in the opinion.

*J. C. Baker*, for the defendants.

The court refused to deliver the estate to Mrs. Doty before issue was born. *Doty v. Chaplin*, 54 Vt. 361.

In the interpretation of a will, the purpose of a court of equity is to ascertain and give effect to the intent of the testator; and the intent is to be determined from the words of the will alone. *Richardson v. Paige*, 54 Vt. 373. The whole of a will must be construed together, and the intent of a testator must prevail. *Casey v. Casey*, 55 Vt. 518; *In re Cushing's Will*, 58 Vt. 393; *Randall v. Josselyn*, 59 Vt. 557.

The granddaughter took an absolute estate under the will. *Stowell v. Hastings*, 59 Vt. 494. It was given for the "proper use and benefit of herself." *Jones v. Bacon*, 68 Me. 34; *Harris v. Knapp*, 21 Pick. 412. Whenever it is the clear intention of the testator that the devisee shall have an absolute property in the estate devised, a limitation over must be void. *Ide v. Ide*, 5 Mass. 500; *Jackson v. Ball*, 10 Johns. 19; 2 Redf. Wills, p. 278.

There is, however, no necessary repugnancy between the clauses named. The whole will shows that the testator intended by this clause, the same meaning, as though it had been expressed in this way: But if my granddaughter, Mary Helen Eddy, shall die without having had lawful issue living, then I give, etc. *White v. White*, 52 Conn. 518; *Coe v. James*, 9 Atl. Rep. 392; *In Matter of Railway Co.* 105 N. Y. 89.

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*J. Prout*, for the orators.

The residue of the estate consists of money. That it is personal property affords us no aid in the construction of the language of the bequest, as "personal property may be subject to the same modifications of ownership as real estate, by way of executory devise." 2 Redf. Wills, 654, n. 40; 2 Kent Com. 280.

The case stands then upon the language of the bequest, and the fact that Mary Helen, now Mrs. Doty, did survive her mother, and has lawful issue living. She may not have such issue living at her death. That is uncertain. In the event that she does not, then this remainder or residue of the estate goes according to the provisions of the will to Chaplin and Richardson, if the bequest to them is not void as repugnant to the devise to Mary Helen, as some cases hold it may be.

In many cases it is held that the intent of the testator is to govern in the construction of a will, and that is stating the whole law upon the subject, unless, indeed, his intent, as manifested in the will, is in violation of some unyielding principle of law. But the difficulty in the case is, what was the testator's intent,—was it that Mary Helen should take this residue unconditionally and absolutely upon having lawful issue living, or did the testator intend to restrict this bequest by the subsequent provisions of the will?

Then to whom shall this residue be paid, or how shall the orators administer their trust? The cases relating to the subject perhaps answer the inquiry. We can add nothing to what is there said. *Hibbard v. Hurlburt*, 10 Vt. 178; *Richardson v. Paige*, 54 Vt. 373; *Smith v. Bell*, 6 Pet. 68; *Meyer v. Snow*, 24 Reporter, 263; *Freeman v. Coit*, 96 N. Y. 63; *McClosky v. Gleason*, 56 Vt. 264; *Randall v. Josselyn*, 59 Vt. 557; 105 N. Y. 89; *Hawkins, Wills*, 207.

The opinion of the court was delivered by

POWERS, J. This bill is brought to obtain a judicial construction of the will of James McConnell.

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The clause of the will brought in question is as follows :

“ And if my granddaughter, Mary Helen Eddy, shall survive her mother, Laura C. Eddy, and shall marry and have lawful issue living, then I give and bequeath the residue of my estate to my said granddaughter, Mary Helen Eddy, to be for the proper use and benefit of herself and heirs forever. But if she shall not marry, or marrying shall have no issue living, then I give and bequeath to her the interest only of what may remain of my estate after the death of her mother, Laura C. Eddy, to be paid to her annually by my executors or their survivors for and during her natural life. But if my granddaughter, Mary Helen Eddy, shall die without lawful issue living, then I give and bequeath whatever may remain of my estate in equal portions to my relations, George W. Chaplin and David A. Richardson, to be by them distributed to such heirs of each, at such times and in such manner as they shall deem fit and proper.”

The conceded facts are that Mary Helen Eddy has survived her mother, Laura C. Eddy,—has lawfully married one John C. Doty, and has now living a daughter, Laura Miriam Doty, the fruit of said marriage.

The precise conditions then named in the first paragraph of the above clause in McConnell's will exist, which by said clause, gave the residuum of the estate to Mary Helen “to be for the proper use and benefit of herself and heirs forever.” If this paragraph stood alone no doubt could arise as to its meaning. If Mary Helen took the residuum for the proper use and benefit of herself and heirs, she took an absolute estate. *Stowell v. Hastings*, 59 Vt. 494. The language has the same meaning and effect as a grant in a deed to one and his heirs forever.

It is an elementary rule of construction that an absolute gift in a will, will not be defeated by a subsequent repugnant clause. If the subsequent clause is plainly a qualification or condition, which evidently was intended by the testator to be read as part of the preceding clause, the rule is different. It makes little difference in the construction whether the granting clause itself is in form conditional ; or the condition is annexed

to a clause in form absolute. The test is, what did the testator mean by the language he uses? *Richardson v. Paige*, 54 Vt. 373.

The question then is whether the later paragraphs of the clause in question were added to the first paragraph by way of limitation or condition, or whether each and all may stand consistently with each other.

As already said, the testator has imposed three conditions upon which, under the first paragraph, an absolute estate will pass to Mary Helen, and these conditions are all answered.

When the testator was particular to specify the conditions upon which his granddaughter should have the estate absolutely, it seems rather strange that he should omit to incorporate in this paragraph further conditions affecting the devise, if he intended to further limit it.

But passing this point, we think the two subsequent paragraphs were not intended to have effect at all, if the several events named in the first happened.

The second paragraph is antithetical merely. "If she shall not marry, or marrying have no issue living," then inasmuch as the conditions named in the first paragraph fail, the gift takes on a new character. So far the testator has used no repugnant language. He says if Mary Helen marries and has issue living, she and the issue take absolutely. If she does not marry, or, if she marries and has no living issue, she takes only a life estate. These paragraphs are not repugnant to each other; they merely provide for different contingencies that may arise. It is like the familiar illustration used in the books as a gift,—“to A, if he survive me, if not to B,”—where, it is said, that the words import an absolute gift to either A or B as the event may determine.

The doubt as to the testator's meaning arises more directly upon the concluding paragraph, "But if my granddaughter, Mary Helen Eddy, shall die without lawful issue living, then I give, etc.," to Chaplin and Richardson. We think this paragraph, like the second, was intended to provide for a failure of

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one of the conditions named in the first, and is not to have any effect if the condition named in the first, of having lawful issue, exists. In both the second and third paragraphs the testator is manifestly providing for a state of facts that may exist. If Mary Helen marries and has issue living, the first paragraph in the clause has effect and governs the gift; if either event fails, the second paragraph governs. The words "shall die without lawful issue living," mean and are to be read as if they ran "without having *had* lawful issue living."

Taking the whole clause into view, it is quite evident that the testator did not intend in the second or third paragraph to qualify the absolute character of his gift as expressed in the first unless the events named should happen.

We hold, therefore, that Mrs. Doty is entitled under the will to the residue of her grandfather's estate in the hands of the orators, to her own use absolutely.

Pursuant to a stipulation of the parties, the costs of this cause are to be charged to the fund in the hands of the orators.

The decree is reversed and cause remanded to the Court of Chancery with mandate according to the foregoing views.

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## FREDERICK CHAFFEE v. MOSES D. HARRINGTON.

*Replevin. Estray. R. L. s. 4053. Date.*

1. A joint owner of personal property can maintain replevin in his own name to recover it, against one whose right to it is not superior to his.
2. The requirements of the statute,—R. L. s. 4053,—relating to the rights and duties of the finder of a stray beast, must be strictly complied with; thus, in an action to replevy a colt, which the finder had taken and sold at public auction under the statute as a stray beast to the defendant, *it was held* that a joint owner could recover, on the ground that the description of the estray in the advertisement was insufficient, and also that the advertisement was not seasonably recorded in the town clerk's office.
3. The statute requires that a person who finds a stray beast shall advertise the same within six days; *Held*, that the day when the advertisements were posted, is excluded in the computation of the time.

REPLEVIN for a colt. Heard on a referee's report, September Term, 1887, TAFT, J., presiding. Judgment for the plaintiff. The case appears in the opinion of the court.

*Lawrence & Mendon*, for the plaintiff.

*C. H. Joyce*, for the defendant.

The opinion of the court was delivered by

TYLER, J. I. The statute upon which this action is brought is as follows: "When goods of the value of more than twenty dollars are unlawfully taken, or unlawfully detained, from the owner or the person entitled to the possession thereof, \* \* \* such owner or other person may cause them to be replevied." R. L. s. 1230.

It appears by the referee's report that the plaintiff had possession of the horse in controversy on the 30th day of May, 1884, when it strayed from his enclosure. His possession was presumably with the consent of Crampton who owned the horse jointly with him. At all events, under the authority of

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*Sprague & Carr v. Clark*, 41 Vt. 6, and *Cox v. Fay*, 54 Vt. 446, the plaintiff had such possession as enables him to maintain this action unless it appears that the right of the defendant to the property is superior to his.

II. The second question is in regard to the description of the property in the advertisements. Sec. 4053, R. L., is as follows: "If a person finds money or goods, to the value of three dollars, or takes up a stray beast, the owner of which is not known, he shall, within six days thereafter, make two advertisements, describing such money or goods or beast, with the natural or artificial marks, with the time and place of finding or taking up the same, and set them up in two public places in the town in which such property was found."

The advertisement set up by Goodell, who found the colt in his pasture, was as follows: "Came into the enclosure of F. P. Goodell one bay horse colt, supposed to be two years old. The owner is requested to prove property, pay charges, and take it away."

That the colt could have been more accurately described is shown by the report which says: "Said colt was a light bay, not tall and rangy, but, as described, 'chunky;' had a prominent white star in the forehead, about three inches long and two wide, a little, but not much, covered by the foretop; mane and foretop not very long or heavy, mane, tail and legs dark color, constituting what is termed dark points in a horse; carried tail a little to one side; gelding in sex; pacer in gait; age four years as indicated by the teeth, but in general appearance looked rather younger; about six inches of the tail was cut off square, 'banged,' etc.

Sec. 4055 provides that, "If the value of such property exceeds ten dollars, the person finding it shall immediately cause a copy of the advertisement to be published three weeks successively in some newspaper circulating in such town."

The copy furnished by Goodell to the Ludlow Tribune and published therein was even more meagre in its description than

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the posted notices, for it omitted the word "horse" which the latter contained.

It must be held that the description, both in the newspaper and in the posted advertisements, was insufficient to comply with the legal requirements. The plain purpose of the statute in requiring that the stray beast shall be described by its natural or artificial marks is that the owner who sees the advertisements may recognize the beast as his own; also, that when in search of and describing his estray, others who have seen the advertisements may from them be able to identify the beast. In this case not only were the obvious natural marks upon the colt omitted, such as, "chunky" in shape, the "white star," and "dark points," and the artificial mark of the "banged" tail, besides the peculiar gait, but the description that was given was misleading in incorrectly stating the age of the colt, which, as the referee finds, was indicated by his teeth.

III. The statute, R. L., sec. 4056, further requires that, "If the owner of such property does not appear and claim it within twenty days from the date of such advertisement, the person so finding it shall cause a copy of the advertisement to be recorded in the town clerk's office in such town."

The referee reports that the copy was not left in the town clerk's office until "about the last of June," which cannot be said to be in compliance with the section last quoted, as the date of the posted advertisement was May 30th, and that of the published copy June 5th.

The statute further provides that if the owner of the property does not appear and prove his title within ninety days from the time of posting the first advertisement, the person finding the property may sell it at public auction, and that the avails of the sale, after deducting expenses, shall be paid into the town treasury for the use of the owner, if demanded within one year, otherwise for the use of the town; but if at any time previous to the sale the owner appears and proves his title, upon paying the expenses he shall have his property.



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As the owner, after ninety days loses the property, and after one year loses the avails of the sale thereof, it is but reasonable that the requirements of the statute should be strictly complied with. In all such cases where property is sold without the owner's knowledge, and where it is sold with his knowledge but without his consent, as in the sale of property for taxes, entire strictness is required. As was said by DEWEY, J., in *Smith v. Gates*, 21 Pick. 55, a case arising under a statute for advertising and selling impounded beasts, "It is incumbent on the defendant to show that all his proceedings have been in entire conformity with the provisions of the statute, and any failure in this respect being an abuse of an authority given him by law, will make him a trespasser *ab initio*." Again he says: "There can be no rule regulating the proceedings in such cases if we depart from the express provisions of the statute." In that case the sale was made twenty minutes before the expiration of the twenty-four hours' advertisement which the law requires, and it was held invalid.

In *Morse v. Reed*, 28 Me. 481, the court said in a case that arose under a similar statute: "The defendant justifies the taking and must sustain that justification by the law. He must show a full and entire compliance with the requirements of the statute." In all summary proceedings to divest a party of title to his property, the law authorizing the proceedings must be strictly pursued or the whole transaction will be void. An abridgement of the time of notice of the sale for the shortest period must avoid the sale. See *Clark v. Lewis*, 35 Ill. 416, a case under a like statute. In *Rex v. Croke*, 1 Cowper, 26, the rule is stated and has generally been followed in English and American courts, that when by statute a special authority is given to particular persons affecting the property of individuals, it must be strictly pursued and appear on the face of the proceedings.

Plaintiff's counsel strongly urge in their brief that the advertisement was not posted by Goodell within six days after he took up the estray, as the statute requires. The cases of

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*French v. Wilkins*, 17 Vt. 341, and *Robinson v. Robinson's Ex'rs*, 32 Vt. 738, are authorities that the day when the act is done is to be excluded in the computation of time. See, also, *Biglow v. Wilson*, 1 Pick. 485. If the case was to be determined on the question of time we would hold that the advertisements were duly posted.

As the proceedings were illegal on account of the defective description and the failure of Goodell to cause a copy of the advertisement to be recorded in the town clerk's office within the time required by law, the defendant acquired no title to the property as against the plaintiff by his purchase of it at the auction sale; and, as the plaintiff had the right of possession, the action can be maintained in his name.

The judgment of the court below is affirmed.

## JOHN MURPHY v. BOLGER BROTHERS.

*Ejectment. Projection of Roof. Ouster. R. L. s. 1247.*

One is liable in an action of ejectment for a projection of his roof over another's land.

EJECTMENT in common form. Plea, general issue. Trial by court, March Term, 1886, Ross, J., presiding. Judgment for the plaintiff to recover of the defendants the seisin and peaceable possession of the premises and one cent damages and costs.

The plaintiff and the defendants were adjoining landowners, and there was a dispute between them as to the exact location of their division line. The defendants' land was described by courses and distances, and its east line was controlled by the east line of a store building standing upon it. The plaintiff's land was simply bounded by the defendants'. The plaintiff did not claim that the defendants had invaded his property upon the land itself, but did claim that they, in changing the location and making repairs of their buildings, had projected the side of a roof on a barn and on a shed, some sixteen feet from the ground, over the division line and over the land of the plaintiff. Both parties had caused accurate surveys to be made, and they only differed in that one surveyor, who fixed the line for the defendants, located his line from the side of the old store building, while the surveyor for the plaintiff located his by the foundation walls of the same building. The court found that the survey made for the defendants was of the correct line, but that the projection of the side of said roof, as the same was built by the defendants, did extend over said division line and slightly over the land of the plaintiff.

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After this suit was commenced, and after the surveys had been made, but before the trial, the defendants had cut away the entire projection of the roof of their buildings, so that at the time of trial no part of said buildings came to the line, but said buildings were entirely upon lands of the defendants.

*Joel C. Baker*, for the defendants.

The action of ejectment will lie only for real property, as land, or something annexed to land upon which an entry might in fact be made, and of which the sheriff could deliver actual possession. 2 Crabb Real Prop. 2484; *Tyler*, Eject. 37; 3 Bac. Abr. 273; *Rowan v. Kelsey*, 18 Barb. 484; *Jackson v. May*, 16 Johns. 273; *Child v. Chappell*, 9 N. Y. 246.

Ejection lies to recover possession where the sheriff can give possession. *Patch v. Keeler*, 27 Vt. 252; R. L. s. 1247. But here a sheriff can do nothing with a writ of possession, but abate a nuisance.

It lies only for property that is tangible. 4 Bouv. Inst. ss. 3654-7. The wrong must amount to an ouster. 4 Bouv. Inst. s. 3659; *Tyler*, Eject. 83; *Cooley v. Penfield*, 1 Vt. 244; *Stevens v. Griffith*, 3 Vt. 448; *Skinner v. McDaniels*, 4 Vt. 418; *Chamberlin v. Donahue*, 41 Vt. 306.

We find but a single case that sustains the plaintiff's position—*Sherry v. Frecking*, 4 Duer, 452,—and that was overruled by *Aiken v. Benedict*, 39 Barb. 400. See *Vrooman v. Jackson*, 6 Hun, 326. The only remedy is an action on the case for the injury. Wood, Nuis. s. 105; *Tyler*, Eject. 38; *Reynolds v. Clark*, 2 Ld. Raym. 1399. Ejectment will not lie against one claiming an easement in land. Wash. Ease. 2693. Nor will a writ of entry. *Smith v. Wiggins*, 48 N. H. 109. The right to use water in a stream cannot be determined in a real action. *Hobbs v. Gould*, 10 Atl. Rep. 457. Turning a stream of water upon another's land does not constitute an ouster. *Perrine v. Bergin*, 2 Green. 255.

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*C. M. Willard*, for the plaintiff.

The only question involved is the right of recovery in ejectment for an overhanging roof.

Ejectment is, in general, by the common law, only sustainable for the recovery of the possession of real property, upon which, in point of fact, an entry might be made, and of which the sheriff could deliver actual possession. 1 Chit. Pl. 188; Tyler, Eject. 37.

Ejectment was held the proper remedy for space above the land, as where an adjoining roof overhangs it, upon the principle that land embraces all above and below it to an indefinite extent. *Sherry v. Frecking*, 4 Duer, 452. This was disapproved in *Aiken v. Benedict*, 39 Barb. 400, showing an even balance in the court of New York. Also for a chamber without land. 9 Pick. 297; 58 Am. Rep. 447; Sedgw. & W. Tit. Land, pp. 44, 49. Also for oil wells and veins of minerals. 88 Penn. St. 32, 198.

The opinion of the court was delivered by

TYLER, J. The question in this case is whether the plaintiff can maintain the action of ejectment, or should have resorted to an action on the case as for a nuisance.

This action, which was originally employed in England to enable the lessee of lands, who had been ejected therefrom during his term, to recover damages therefor, was subsequently enlarged to enable him also to recover possession of the land. In later years it has been used both in England and in this country to try questions involving the title to real estate. Under our statute, sec. 1247, R. L., a person having claim to the seisin or possession of lands, tenements or hereditaments, is entitled to an action by writ of ejectment, and if he recover judgment it shall be for his damages and the seisin and possession of his lands.

Chitty, vol. 1, page 188, defines the action as sustainable for the recovery of the possession of property upon which an entry might in point of fact be made, and of which the sheriff

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could deliver actual possession, and as not in general sustainable for the recovery of property which is not tangible.

Tyler on Ejectment says, page 37, that by the common law and the general rule, ejectment will not lie for anything whereon an entry cannot be made, or of which the sheriff cannot deliver possession; that it is only maintainable for corporeal hereditaments; that anything attached to the soil, of which the sheriff can deliver possession, may be recovered in this action.

The action of ejectment will lie whenever a right of entry exists, and the interest is of such a character that it can be held and enjoyed, and possession thereof delivered in execution of a judgment for its recovery. *Rowan v. Kelsey*, 18 Barb. 484; *Jackson v. Buel*, 9 Johns. 298.

The precise question in the case at bar is whether the projection of the side of defendants' roof over plaintiff's land and sixteen feet above it was an ouster of plaintiff's possession of his land, or a mere intrusion upon, and interference with, a right incident to his enjoyment of the land.

Blackstone, book 2, page 18, says: "Land hath also, in its legal signification, an indefinite extent upwards as well as downwards"; \* \* \* "the word 'land' includes not only the face of the earth, but everything under it or over it."

Defendants' counsel insists that this action cannot be maintained because there was no intrusion upon the plaintiff's soil, but upon the air or space above it, while plaintiff's counsel claims the rule to be that the action will lie provided the intrusion extends over the line of plaintiff's premises, no matter how slight it is nor how far above the soil.

If the defendants had constructed their barn so that the foundation wall and the building itself had been wholly or in part over the line upon plaintiff's land, there could have been no question as to the plaintiff's right to maintain ejectment. But suppose they had built their foundation wall strictly upon their own land, but close to the line, and had projected the entire side of the building itself a few inches over the line and

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above the plaintiff's land, could the plaintiff maintain ejectment for the intrusion? If not, it would be because the intrusion was not upon the land itself but the space above it. If he could not maintain ejectment, he would be obliged to submit to the invasion and only have his damages therefor. But the law says the land is his even to the sky, and therefore he has a right to it, and should not be compelled to part with any portion of it upon the mere payment of damages by the trespasser. A case can readily be conceived where the projection of the side of a building, or even of bay windows, by one party over land of another would be of so great inconvenience and injury to the latter that a judgment for damages would afford no adequate compensation.

But to carry the illustration one step further. One owner of a party or division wall places upon the top thereof a cornice about two and a half inches wide, which projects over the lot of the adjoining owner. Can the latter maintain ejectment? It was held in *Vrooman v. Jackson*, 6 Hun, 326, that he could not. It was also held in *Aiken v. Benedict*, 39 Barb. 400, that where one erects a building upon the line of his premises so that the eaves or gutters project over the land of his neighbor, ejectment would not lie; that an action for a nuisance was the proper remedy, the court in that case dissenting from the doctrine of *Sherry v. Frecking*, 4 Duer, 452.

A similar case to the one last cited is that of *Stedman v. Smith*, 92 Eng. Com. Law, 1. There the plaintiff and defendant occupied adjacent plots of ground, divided by a wall of which they were the owners in common. There was a shed in defendant's ground contiguous to the wall, the roof of which rested on the top of the wall across its whole width. Defendant took the coping stones off the top of the wall, heightened the wall, replaced the coping stones on the top, and built a wash-house contiguous to the wall where the shed had stood, the roof of the wash-house occupying the whole width of the top of the wall; and he let a stone into the wall with an inscription on it stating that the wall and the land on which it

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stood belonged to him. It was held that on these facts a jury might find an actual ouster by defendant of plaintiff from the possession of the wall, which would constitute a trespass upon which plaintiff might maintain an action against defendant. This case is in point as showing a disseisin of the plaintiff's possession rather than a mere infringement of a right.

In *McCourt v. Eckstein*, 22 Wis. 153, it was held that where some of the stones of defendant's foundation wall projected eight inches over plaintiff's land, the plaintiff might treat this as a disseisin rather than a trespass, and might maintain ejectment.

It clearly is not essential that the intruding object should actually rest upon the plaintiff's soil to entitle him to the action of ejectment, for this action will lie for an upper room in a dwelling-house or other building.

As the law gives the owner of the land all above it within its boundaries, we can find no reason, resting in principle, why, for the projection by one party of a portion of his building over the land of another, as in this case, he may not be liable in ejectment. The plaintiff was disseised of his land, and the defendant was in the wrongful possession thereof by his projecting roof. *Chamberlin v. Donahue*, 41 Vt. 306. There is no more difficulty in describing in a declaration a projection above the soil than one upon it, nor can there be any difficulty in the sheriff delivering possession to the plaintiff. No question was raised in the court below as to the sufficiency of the declaration.

The judgment of that court is affirmed.



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## ACTION, TRANSITORY.

An action for breach of covenant of warranty in a deed of land under our statute, is transitory; and the courts of this State, when the grantor resides here, have jurisdiction, although the land is located in another state. *Tillotson v. Prichard*, 94.

## ACTION ON THE CASE.

An officer having a writ by which he is commanded to arrest the body of the defendant, a railroad engineer, may lawfully stop a train of cars run by such engineer, for the purpose of making the arrest. *St. Johnsbury & L. C. R. R. Co. v. Hunt*, 588.

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## AGENCY.

1. When a financial agent or attorney mixes the money of his principal with his own by depositing it in his general bank account, and draws it out and uses it in his own business, it is presumed that he has gained a benefit, and on failure to show how much he has derived from the use, he is chargeable for interest. *Blodgett's Est. v. Converse's Est.* 410.

2. In such case, a request to settle, with an expressed willingness by the agent, but a neglect to do so, because neither party was quite ready to attend to it, is not equivalent to a demand for payment. *Ib.*

3. When an agent has interest-bearing securities in his possession belonging to his principal, the law presumes that he received the interest

thereon; the burden is on him to prove that he had not received it; and without an explanation sufficient to relieve him from payment he is chargeable with the interest. *Ib.*

4. A married woman died testate, and in a short time her executrix deceased. No steps were taken for some time to have the will proved, and the husband of the testatrix had her estate in his hands. It was not found that the delay was caused by his fault; *Held*, that he could not be treated as an executor *de son tort*; and that he should only be held to exercise the care of a faithful agent. *Ib.*

5. A married woman is a competent witness in favor of her husband to testify to the terms of a contract, where the parties had no personal interview in making it, and she acted as the agent of both, of the defendant in carrying his proposition to her husband, and of her husband in carrying his acceptance to the defendant. *Martin v. Hurlburt*, 364.

*See* LIMITATIONS, STATUTE OF, 4; INSURANCE 7.

#### AGRICULTURAL SOCIETY.

1. It is the duty of an agricultural society to render the place, where it holds a public exhibition, reasonably safe to all persons lawfully in attendance. *Selinas v. The Vt. State Agri. Soc.* 249.

2. It is a question of fact for the jury, whether an agricultural society is guilty of negligence in suffering during its exhibition a striking machine to be used on its grounds, with no guard around it, whereby the plaintiff was injured by a person, not an officer or a servant of the society, in the act of swinging a mallet to strike the machine, although the defendant had made a motion for a verdict on the plaintiff's testimony. *Ib.*

3. This is not a case of *ultra vires*, although the machine was not placed there by the defendants and its use was foreign to the purposes of their organization; and there was no evidence that they had any interest in it, or that it was there by their permission or knowledge; but it was for the jury to decide, if it were not assumed that the machine was there by license, whether it had been so long upon the grounds that the defendants ought, in the exercise of reasonable care, to have known of its presence, and also whether it was dangerous. *Ib.*

4. It was also for the jury to decide, whether the plaintiff's conduct was prudent or whether he was guilty of contributory negligence. *Ib.*

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#### AMENDMENT.

1. A declaration counting upon covenants of seisin and right to convey may be amended by a declaration upon the covenant of warranty; for it is only a different description of the original cause of action. *Tillotson v. Prichard*, 94.

2. Under a reference, it is immaterial when an amendment of pleading is made. *Ib.*

3. The court has no authority to allow an amendment to pleadings when it has no jurisdiction of the cause of action. *Goff & Angus v. Robinson*, 633.

*See* CHANCERY 6, 16; PLEADING.

#### ANIMALS.

1. One is not liable for the damages caused by his dog, though he knows that he has a vicious propensity, if he exercises proper care and diligence to secure him so that he will not injure any one, who does not unlawfully provoke or intermeddle with him. *Worthen v. Love*, 285.

2. In an action to recover for injuries caused by a dog, which the defendant admitted that he knew was vicious, but claimed that he kept him securely chained, evidence was admissible to prove that the defendant knew that the dog broke away and unprovoked bit a child only a short time before the plaintiff was injured,—on the ground that it tended to show that the defendant did not keep the dog securely chained, and to impeach the credibility of the defendant; and this is so although the plaintiff's counsel did not state the object of the evidence, and the court supposed it only bore upon the character of the dog and defendant's knowledge of it. *Id.*

3. Under the statute,—R. L. s. 3184,—one is not guilty of contributory negligence in turning his cattle into his pasture although he has knowledge that the division fence of an adjoining landowner is insufficient, and that if his cattle should escape into such owner's field they would be liable to injury; and in an action to recover for injuries to the plaintiff's cattle, evidence is not admissible in behalf of the defendant to prove such knowledge. *Eddy v. Kinney*, 554.

4. ESTRAYS. The requirements of the statute,—R. L. s. 4053,—relating to the rights and duties of the finder of a stray beast, must be strictly complied with; thus, in an action to replevy a colt, which the finder had taken and sold at public auction under the statute as a stray beast to the defendant, *it was held*, that a joint owner could recover, on the ground that the description of the estray in the advertisement was insufficient, and also that the advertisement was not seasonably recorded in the town clerk's office. *Chaffee v. Harrington*, 718.

5. DATE. The statute requires that a person who finds a stray beast shall advertise the same within six days; *Held*, that the day when the advertisements were posted, is excluded in the computation of the time. *Id.*

APPEAL. *See* EXECUTORS AND ADMINISTRATORS 3; CRIMINAL LAW 12.

APPLICATION OF PAYMENT. *See* LIMITATIONS, STATUTE OF; CHANCERY 12.

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#### ATTACHMENT.

1. It is not a legal attachment of property in the possession of a bailee, where the officer first commences his service by attaching other property, and then merely writes to the bailee that he has attached that in his possession, and requests him to keep it, and the bailee agrees to keep it. The officer did not acquire sufficient possession of the property. *Barney v. Rockwell*, 444.

2. It is not necessary that an officer in making an attachment should have the writ with him; it is sufficient if he has it in his custody and control when he takes the property into his possession, without having the writ upon his person; and it is error for the court to refuse, on request, to so instruct the jury. *Ib.*

ATTACHING CREDITORS. *See* CHANCERY 9; CHATTEL MORTGAGE.

#### ATTORNEY.

1. The plaintiff was general attorney for the defendant railroad company, and in that capacity, but under specific directions from its president, he rendered services in several suits and was paid for the same, after he ceased by a tacit understanding to be such general attorney, and without having been employed as a special attorney, and without knowledge on the part of the defendant's agents, except its attorney, who had no authority to employ him, also rendered services of some value in the same suits; *Held*, that the plaintiff was discharged from all employment in the suits, and that he could not recover, even on the ground of implied assumpsit. *Safford v. The Vt. & Ca. R. R. Co.* 185.

2. PRIVILEGED COMMUNICATIONS. The attorney of a client will neither be compelled, nor permitted, to disclose papers delivered, or communications made to him by his client, without his client's consent, when the validity of the claims described in the papers is in controversy; thus, the attorney who brought the suit was properly excluded from testifying in behalf of the defendant, that while he was the attorney of record for the plaintiff he furnished the defendant's agent a specification of the plaintiff's claim, which differed materially from the one on file in the case; and such agent was also properly excluded as a witness. *Hicks' Estate v. Blanchard*, 673.

*See* AGENCY.

#### BAIL ON MESNE PROCESS.

1. In assumpsit, where the writ issued under the statute,—R. L. s. 1478, —as a *capias* against an absconding debtor, the defendant was bail for the debtor, and, on the return day, surrendered him into court, and was discharged. The justice of the peace before whom the case was pending, after a rendition of judgment and a partial hearing as to the debtor's situation and property, continued the case at the debtor's request for a further

hearing in this respect, and at the same time took the defendant's recognizance for his appearance; *Held*, (a) That the recognizance was valid; (b) That it was valid although larger than the judgment: (c) That the defendant could surrender the debtor in discharge of himself. *Worthen v. Prescott*, 68.

2. The defendant was the same as special bail, or bail above, at common law; and he could, at any time or place, without a bail-piece, have apprehended the debtor, even on Sunday, or in his dwelling, or in another jurisdiction. In law he was the debtor's jailer. *Ib.*

#### BAILMENT.

1. In an action on the case for negligence against the bailee of a horse for hire, the burden is on the plaintiff throughout the trial to prove negligence; and it is not shifted by merely showing that the horse was sound when delivered to the bailee, and when returned, that it was injured in a way that does not ordinarily occur without negligence. *Malaney & Blakey v. Taft*, 571.

2. The rule that prevails in an action of trover as to the liability of a bailee, who violates the contract of bailment, does not apply in an action on the case for negligence. Thus, in an action for immoderate driving and improper care of the plaintiffs' horse where his evidence tended to show that the defendant drove a greater distance than he engaged for, and that the horse was sound when taken by the defendant, but injured when returned, *it was held*, that there was no error in the charge of the court, that the gist of the action was negligence, and that there could be no recovery, unless the jury found that the horse was injured by improper use, care or driving. *Ib.*

#### BANKRUPTCY.

1. The insolvent law may act upon contracts made in another state by citizens of this State, when all the parties interested are within the jurisdiction of our court; an assignment vests in the assignee all the property, whether in this or another state; and he can recover of a creditor for property situated in another state, which he purchased there of the debtor in fraud of the law in payment of his debt. *Crampton, Assignee, v. Valdo M. Co.* 291.

2. In an action of trover by an assignee against a creditor who purchased the debtor's property in fraud of law, and applied it in payment of his debt, evidence of the price was admissible on the question of damages—not conclusive, but to be considered in connection with the fact that the sale was peculiar, and as tending in some measure to show the value. *Ib.*

3. No demand was necessary. *Ib.*

4. The measure of damages was the value of the property at the time the defendant took it. *Ib.*

5. The court allowed the plaintiff to file a *remittitur*, certain articles having been by inadvertence included in the verdict, which were not taken by the defendant, and rendered judgment for the balance. *Ib.*

6. ASSIGNMENT—HOMESTEAD. The homestead of an insolvent debtor

passes to his assignee on the assignment of his estate by the court, when such homestead is liable to be taken on execution in payment of debts contracted before the homestead was acquired; and in such case the assignee's deed may convey the homestead to one who has purchased the premises of him. *Tylden v. Crimmins*, 546.

7. And an assignee's deed, which contained these words, "*subject to the mortgagor's homestead right*," was construed to mean such right as he had against the order of assignment: and it was held, that if the deed did not convey the homestead, it still remained vested in the assignee for the payment of such debts. *Ib.*

8. DISCHARGE. A discharge under our insolvent law is not a bar to recovery upon a note owned by one, who, when the discharge was granted, was a citizen of another state, and who in no way became a party to the insolvency proceedings, although the note was executed in this State, and when executed both parties to it were citizens of this State. *Roberts v. Atherton*, 563.

9. In an action by an assignee claiming to recover on the ground that the defendant purchased property of the insolvent debtor in fraud of law, where the referee reported that he was not able to find that the defendant had reasonable cause to believe that the debtor was insolvent, but submitted to the court whether certain facts found should have put him upon inquiry; namely, that the transfer was not made in the usual course of business; that the debtor sold out his entire stock to one person; that defendant made no inquiry as to his financial condition; *Held*, that these were *prima facie* evidence of fraud, and threw the burden of proof on the defendant to sustain the validity of proof on the defendant to sustain the validity of the transaction; and that he was put upon inquiry. *Reed v. Moody*, 668.

#### BILLS AND NOTES.

1. CONSIDERATION. The surrender of an overdue note enforceable against one of two indorsers though not against the other or the principal, is a valuable consideration for a new note signed and indorsed by the same parties with an additional indorser. *Bromley v. Hawley*, 46.

2. PURCHASER OF—PUT ON INQUIRY. The plaintiff was the owner of \$4,000 note which he purchased of one of the directors of a marble company which issued it, and a little more than two months after it was due he was induced by the same director to exchange the old note for a new one signed by the same party as the old one and with the same indorsers, with this defendant as an additional indorser; *Held*, under the circumstances of the case, that the facts that the note was overdue; that it amounted to \$4,000; that it had different numbers on it,—one placed there by the maker and the other by the bank,—were not sufficient to put the plaintiff upon inquiry; it appearing that he took the note in good faith; and that the party with whom he negotiated was a man of extensive business, and his character and financial standing high. *Ib.*

3. INDORSER. The rights of an indorser of a note are not such that a

purchaser is bound to inquire, unless the circumstances are such as ought to excite the suspicion of a prudent and careful man, as to its validity as between the parties to it. *Ib.*

4. NOTE LOST. The payee of an overdue negotiable note, payable to order, but not negotiated, can recover in an action at law, the amount of the note, although it is lost, and it is not shown to have been destroyed. *Clark v. Snow*, 205.

5. BONA FIDE HOLDER. It is presumed that the holder of a negotiable note is a *bona fide* holder; and when he produces it in court and proves its execution, he makes out a *prima facie* right of recover, and is not bound to fortify his title to the note beyond the presumption, when the defence is an entire failure of consideration, and the defendant fails in such defence. *Blaney v. Pelton*, 275.

6. CONSIDERATION. The defendant executed his negotiable note in part payment for a printing press, and having used it for several months in the precise kind of work for which it was purchased, he exchanged it for another machine, realizing for the press more than he was to pay for it. He only complained that it would not do the work so well and so advantageously as the vendor represented; *Held*, that the defendant's claim came far short of the defence of an entire failure of consideration. *Ib.*

7. INDORSERS. CONTRIBUTION. In an action between indorsers for contribution, there can be no recovery, where the defendant indorsed the note at the request and for the benefit of the plaintiff, who had agreed with the maker of the note, for the consideration of \$24, to raise the money on it; and the note had been delivered to him for that purpose; and he procured the defendant's indorsement to assist him in getting it discounted. *Martin v. Marshall*, 321.

8. PAROL EVIDENCE. Parol evidence is admissible to prove the true relation between indorsers; and an apparent surety may be shown to be a principal, and an apparent principal a surety. *Ib.*

9. When one sells property and agrees to accept in payment a note payable on time with security, and the buyer refuses to give the note and security, the seller can sue at once. And in such case, where the seller requested the buyer to take the property and pay for it as agreed, and he refused to do so, no formal demand for the note and security was necessary. *Foster & Jaquith v. Adams*, 392.

10. INDORSEMENT—LIMITATIONS, STATUTE OF. An indorsement upon a note, though not in the handwriting of the payor, is some, but not sufficient, evidence of payment, and may be weighed in determining whether a payment in fact had been made, as bearing upon the Statute of Limitations. The party who made the indorsement was properly allowed to testify to the circumstances attending the making of it. *Lawrence v. Graves*, 657.

*See* WITNESS; BANKRUPTCY 8; PLEADING.

BILL, in what part of it may be signed by the Governor. *See* CONSTITUTIONAL LAW.

**BILL OF INTERPLEADER.** *See* CHANCERY 14.

**BILL TO REDEEM.** *See* CHANCERY 10.

**BODY WRIT.** *See* BAIL ON MESNE PROCESS; ACTION ON THE CASE.

**BONDSMEN** for collector of taxes. *See* TAXATION.

**BOUNDARY LINE.** *See* FENCE.

#### BOOK ACCOUNT.

In an action against a deceased person's estate, the plaintiffs' accounts on book, with proof of the handwriting and when made, are evidence under the statute (R. L. s. 1004), tending to show a sale and delivery of the goods in dispute; and the auditor's decision as to how much weight should be given to them, and whether they are sufficient to entitle the plaintiff to recover, is conclusive. *Green v. Mills' Est.* 440.

**BURDEN OF PROOF.** *See* WILL 9; BAILMENT.

**CAPACITY, MENTAL.** *See* CHANCERY 14; PAUPER.

**CÁPIAS.** *See* BAIL ON MESNE PROCESS.

**CASES DISTINGUISHED.** *Cortiss & Way v. Grow*, 58 Vt. 702. 453.

#### CHANCERY.

1. **PARTIES.** Although the general rule is that all persons interested in litigation should be before the court, this case is within the exception that, where the parties are so numerous as to make it impracticable or greatly inconvenient and expensive, it is sufficient, if such number be joined as will fairly represent the interest of all; and that, as both classes of depositors were fairly represented in the litigation, all of them were bound by the decree. *Dewey, Inspector of Finance, v. The St. Albans Trust Co.* 1.

2. **LIEN OF GUARDIAN ON WARD'S ESTATE, FORECLOSURE OF.** On the death of an insane ward, his administrator took possession of his estate with the consent of the guardian. The whole conduct of the guardian showed that he did not intend to retain a lien on the *corpus* of the property for what was due him, until after the sale of the property, when it appeared that the estate was insolvent; but he expected to be first paid out of the avails of what was sold; *Held*, (a) That if the guardian ever had an equitable lien he had lost it; (b) That he had no lien on the homestead; for that also went into the possession of the administrator, with the guardian's consent. *Farr v. Putnam*, 54.

3. **PLEADING—PRACTICE.** On a bill brought in such case to procure a foreclosure of the lien, the court declined to decide whether the guardian had a superior right to the avails of the property after its sale; or whether, on a bill properly drawn, he had such right. *Id.*

4. **PRACTICE—PAROL EVIDENCE—DEED—MORTGAGE.** The question made by the pleadings was whether a deed absolute in form was a mortgage; and on the hearing before the master, the parties entered into a written agreement relative to the accounting and the final disposition of the case; *Held*, that parol evidence, as the agreement was not ambiguous, was not admissible on a subsequent hearing to show that the real agreement was not expressed in the writing as understood by the orator; and



that the case is wholly unlike *Flint v. Johnson*, 59 Vt. 190, where the pleadings were adapted to the reformation of the agreement, though made after the original suit was commenced. *Mussey v. Bates*, 271.

5. **EQUITABLE LIEN, FORECLOSURE OF.** A reservation in a warranty deed of land of the crops that might be produced thereon, to secure the interest on the purchase money, is a valid lien and may be foreclosed. *Darling v. Robbins*, 347.

6. **ACCOUNTING—PLEADING—AMENDMENT.** Where a bill was brought for an accounting under a contract, and the decree in the court below included an account which accrued just before the contract was made, and the prior account was carried forward into the statements made to the defendants and never objected to by them, but was treated as a part of the account sued for, it was held that there was no error in the decree, and if necessary, an amendment would be allowed to the bill to include the prior account. *Moore v. Tanning Co.* 459.

7. **CORPORATION, PRIVATE.** The orators and two of the defendants were members of a private corporation, engaged in the tannery business. The stockholders voted to consolidate its business with a tannery owned by the orators in another state. That vote was carried out to the extent of transferring the personal property of the foreign tannery to the defendant corporation, but not the realty; *Held*, whether the purchase of real property in another state was within the corporate powers of the defendant, it should account for the actual value of what it received. *Ib.*

8. As no question was raised in the report as to the value of the property, it is presumed that the master allowed on legitimate evidence the actual cash value. *Ib.*

9. **DEED WHEN A MORTGAGE—IN FRAUD OF CREDITORS.** A deed absolute in form, but given to secure a debt and also to cover the grantor's property for the purpose of preventing attachment, is a valid mortgage between the parties; and, on payment of the debt, the grantee will be ordered to reconvey, on the ground that he cannot take advantage of his own fraud upon others to defraud the grantor. *Still v. Buzzell*, 478.

10. **BILL TO REDEEM—PLEADING—AMENDMENT.** Although a bill must be framed to the circumstances that exist when the action is brought, yet the decree will be affirmed when it is correct in form and amount, if the bill has been formally amended: thus, when the bill was brought to redeem, the debt had not been paid: but it had been,—and there was a balance due the orator,—prior to the hearing before the master, by applying on the debt the use of the premises occupied by the defendant in possession under his mortgage: *Held*. (a) That the orator would have been entitled to a decree, if his bill had been properly framed; (b) That the bill should have contained an offer to pay any balance found due the defendant on accounting; (c) That the cause should be remanded for amendment of the bill, and the decree ordering the defendant to redeem and pay the balance due the orator, should be affirmed. *Ib.*

11. **MORTGAGEE IN POSSESSION.** The orator, after the condition of the mortgage had been broken, rented the premises (a pasture), and the mort-

gagee notified the tenant that he must pay the rent to him; and the mortgagee also turned some of his own stock in in that season, and afterwards used the pasture to some extent: *Held*, on a bill to redeem, that the defendant took possession, and was accountable for such rents and profits as he ought to have received. *Ib.*

12. PAYMENTS, APPLICATION OF. When a debtor, owing both a secured and an unsecured debt, makes a general payment without any direction, and no application is made, it should be applied to the unsecured debt. *Ib.*

13. COSTS. In a suit to redeem the defendant was not allowed costs on false issues raised by his answer, and costs were allowed the orator. *Ib.*

14. MENTAL CAPACITY—UNDUE INFLUENCE—EXPECTANCY. To make a binding contract a party must possess capacity enough to understand and comprehend both the nature and effect of the transaction. Thus, the assignment of an expectancy will be set aside when executed by a woman whose mind was so impaired by age that, while she understood the effect of the assignment, she did not its nature, and who was not able to distinguish her own debts from those of others, or to discriminate whether in equity they belonged to her to pay: and when undue influence was exercised to procure the assignment. *King v. Davis*, 502.

15. HOMESTEAD—PARTITION—JURISDICTION. The Court of Chancery has jurisdiction in partition cases involving the homestead, when its severance would greatly depreciate the value of the residue of the premises, although proceedings are pending in the Probate Court to set out the homestead; and that there may be an equality of partition, the court will determine in its discretion the manner of granting relief, either in accordance with statute,—R. L. ss. 1908-9,—or in ordering the payment of money by one to the other owner. *Lindsey v. Brewer*, 627.

16. AMENDMENT—PLEADING. A bill brought under section 1908, R. L., for relief, where a severance of the homestead would greatly depreciate the value of the residue of the premises, is defective, if it does not allege that the value of the property exceeds \$1,000; but a bill with such defect is amendable. *Ib.*

17. MARRIED WOMAN, SEPARATE FROM HUSBAND.—The fact that a married woman has deserted her husband and is living separate from him at the time of his decease, does not deprive her of a homestead in his premises. *Ib.*

18. SPECIFIC PERFORMANCE—FRAUD—AQUEDUCT—PAROL LICENSE. A parol license to lay an aqueduct to a spring of water on one's land is irrevocable during the existence of the aqueduct: and a court of equity, on the ground of equitable estoppel, will protect the licensee in the use of the aqueduct; and will grant and continue an injunction restraining the owner of the spring from interfering with the aqueduct until its decay: for a revocation of the license would operate as a fraud. *Clark v. Hidden*, 702.

19. And the licensee has the right to make such repairs on the aqueduct as may be necessary to keep it usable, but not such as in any just sense would amount to a renewal of the aqueduct. *Ib.*

20. **MISTAKE.** Where there was a misunderstanding between the parties, and the oratrix supposed that she was to have the water for nothing, but the defendant understood that she was to pay him at least nominal rent, so that she would not acquire title by possession, and the master found that the right to take the water was worth \$3 per year, the injunction was continued on condition of payment of that sum. *Ib.*

21. It seems that, at law, the licensor may revoke his license at any time. *Ib.*

22. Distinction between a license and an easement stated. *Ib.*

**CHALLENGE, JUROR.** See CRIMINAL LAW.

**CHARTER.** See MUNICIPAL CORPORATION; RAILROAD.

**CHARTER, FORFEITURE OF.** See TRUST COMPANY.

**CHATTEL MORTGAGE.** See MORTGAGE.

**CITY.** See MUNICIPAL CORPORATION.

**CLERK of County Court.** See CRIMINAL LAW 8; TRUSTEE PROCESS.

**COASTING.** See MUNICIPAL CORPORATION 10.

**COLLECTOR.** See TAXATION.

**COMMITMENT.** See CRIMINAL LAW 11.

**COMMON LAW.** See CRIMINAL LAW 4.

**CONSIDERATION.** See BILLS AND NOTES 6; PLEADING 12.

**CONSTABLE.** See TAXATION.

### CONSTITUTIONAL LAW.

The Constitution does not require the governor to sign a bill at its end in order that it may become a law; it is sufficient if he approves it and signs it in any place intentionally and understandingly; thus, when he signed a bill at the end of the second section, and on discovering his mistake, erased his name and failed to subscribe the bill until after the time for signing bills had elapsed, it was held to be a valid law. *Nat. Land and Loan Co. v. Mead*, 257.

### CONTRACT.

1. **IMPLIED ASSUMPSIT.**—The plaintiff was general attorney for the defendant railroad company, and in that capacity, but under specific directions from its president, he rendered a service in several suits and was paid for the same, after he ceased by a tacit understanding to be such general attorney, and without having been employed as a special attorney, and without knowledge on the part of the defendant's agents, except its attorney, who had no authority to employ him, also rendered services of some value in the same suits; *Held*, that the plaintiff was discharged from all employment in the suits, and that he could not recover, even on the ground of implied assumpsit. *Safford v. The Vt. & Cu. R. R. Co.* 185.

2. **WORK—QUANTUM MERUIT.** Assumpsit on a *quantum meruit* will lie to recover what one's services are reasonably worth, where the parties supposed that they had entered into a contract in regard to compensation,

but through a failure to understand each other, their minds never met. *Tucker v. Preston*, 473.

3. INTEREST. In an action to recover for labor extending through several years, where there is no express contract as to compensation, there is no error in allowing interest on the balance due at the end of each year, if this was the method of ascertaining the sum due; and in such case the question of demand does not arise. *Ib.*

4. DEMAND. There is no question of demand in such cases. *Ib.*

5. PARENT AND CHILD. The plaintiff lived in the defendant's family, furnished some provisions and performed some labor, but the referee found that neither party expected that they were to be paid for, and that there was neither an express nor an implied promise; *Held*, that there could be no recovery. *Hicks v. Blanchard*, 673.

*See* ATTORNEY 1; SALE.

CONTRACT, for future support. *See* MORTGAGE 4.

CONTRACT, RATIFICATION OF. *See* INFANT.

CONTRIBUTORY NEGLIGENCE. *See* FENCE; NEGLIGENCE.

CORPORATION. *See* TRUST COMPANY; RAILROAD; MUNICIPAL CORPORATION; PLEADING 6.

CORPORATION, PRIVATE. *See* CHANCERY 7.

#### COSTS.

1. On an appeal from the decision of commissioners, where their allowance was greatly decreased, the costs were properly proportioned. 161.

2. In an action of trover for the conversion of several articles where the plaintiff failed to recover all that he sued for, the defendant is not entitled under the statute,—R. L. s. 1451,—to an apportionment of the costs; as only a single issue was made by the pleadings. *Ross v. White*, 558.

3. But in such case the court below denied the plaintiff costs as to claims which he failed to establish, and the judgment was affirmed. *Ib.*

COURT OF CHANCERY. *See* RAILROAD 1.

#### COURT, COUNTY.

A motion made in the County Court to re-commit a referee's report on the ground that he erred in finding facts, is addressed to the discretion of the court; and its decision thereon is not revisible, where the case shows that the referee had some evidence properly before him to sustain his findings. *Thayer v. The Cen. Vt. R. R. Co.* 214.

*See* CRIMINAL LAW; PROBATE COURT.

COURT, SUPREME. *See* RAILROAD 8; PRACTICE 5.

COUNTER CLAIM. *See* SALE 6.

#### COVENANTS.

1. EVIDENCE—POSSESSION. The payment of taxes assessed on land is neither an act of possession nor evidence of a possessory title. *Tillotson v. Prichard*, 46.

2. **AMENDMENT.** A declaration counting upon covenants of seisin and right to convey may be amended by a declaration upon the covenant of warranty; for it is only a different description of the original cause of action. *Ib.*

3. **PRACTICE.** Under a reference it is immaterial when an amendment of pleadings is made. *Ib.*

4. **A COVENANT RUNS WITH THE LAND.** A covenant of warranty runs with the land as an incident to it, although the grantor had neither the legal title nor the possession, when all the grantees have had possession; and the last grantee, who holds through several mesne conveyances, and who was evicted, can maintain an action based upon such covenant. *Ib.*

5. **PRACTICE—STAYING EXECUTION.** And, if in such case the grantor is liable to two actions,—one in favor of his grantee for a breach of the covenant of seisin, and another to his grantee's assignee upon that of warranty, the court can protect his rights by attaching conditions to the judgment, or staying execution. *Ib.*

6. **TRANSITORY ACTION.** An action for breach of covenant of warranty in a deed of land under our statute, is transitory; and the courts of this State, when the grantor resides here, have jurisdiction, although the land is located in another state. *Ib.*

7. **EVIDENCE.** There was no error in allowing a surveyor in testifying to use a plan of the lands in contention, although it was in part a copy of the government survey. *Ib.*

8. **DECLARATIONS OF PARTY EVICTED.** The declarations of the party who evicted the plaintiff, and also of his workmen cutting timber on the land, were admissible to show an eviction. *Ib.*

9. **DAMAGES—LEX LOCI REI SITAE GOVERNS.** In an action for breach of covenant of warranty, where the grantor resided in Vermont, the grantee in New Hampshire, and the land was situated in Minnesota, the construction of the contract, including the rule as to damages, is governed by the law of the place where the land is situated: and although the plaintiff was entitled to a judgment, yet, the referee having failed to find, as a fact, what that law is, the court declined to presume that it was the same as the law of this State, and recommitted the case for the court below to determine the damages according to the above rule. *Ib.*

10. **DEED, WIFE OF GRANTEE WITNESS TO.** The plaintiff's wife was a witness to the deed; by the law of Minnesota she was competent and could be examined with the consent of her husband; the deed was not objected to on the ground that it was defectively executed; *Held*, that the deed was legitimate evidence to show an assignment of the land to the plaintiff; and *quære* whether a deed defectively executed is not good between the parties. *Ib.*

11. **PLEADING—DECLARATION—DEMAND FOR COSTS.** In an action for breach of covenant in a deed of land it is not necessary that the declaration should contain an allegation that the cost and expenses of litigating the title were ascertained and notice of the amount given to the defendants

and a demand made therefor; for notice is not a condition of liability, nor of the gist of the action. *Tarbell v. Tarbell*, 483.

12. EVIDENCE. Certain evidence, *q. r.*, as to the value of the land was properly admitted. *Ib.*

13. REMITTITUR. In an action for breach of covenant where the verdict was larger than the plaintiff's claim in his specification, it is a proper case for the allowance of a *remititur*. *Ib.*

14. But a *remititur* should not be allowed, unless it clearly appears just what the excess in the verdict is: and the verdict should be set aside if it does not so appear. *Ib.*

15. The Supreme Court rendered judgment where the parties finally agreed as to the excess in the verdict, thereby increasing the *remititur* allowed by the court below. *Ib.*

#### CRIMINAL LAW.

1. PLEADING. Whether an indictment in the words of the statute is sufficient depends on whether every fact necessary to constitute the offense is charged or necessarily implied from the language used. Thus, where the statute,—R. L. s. 4241,—provided: "A man with another man's wife, or a woman with another woman's husband, found in bed together under circumstances affording presumption of an illicit intention, shall each be imprisoned," etc.; *Held*, that an indictment which charged that the respondent, "being then and there a man," was found in bed with another man's wife, "under circumstances affording presumption of an illicit and felonious intention," was bad in that there was no allegation as to what the illicit intention was. *State v. Miller*, 90.

2. MOTION TO QUASH. A motion to quash must be founded upon facts appearing of record, or admitted or shown by the plaintiff's proof. And such motion, supported by affidavits, based on the ground that the grand jurors, who found the indictment, were not legally qualified to act, was properly overruled. *State v. Ward*, 142.

3. PLEA IN ABATEMENT. The plea in abatement is defective in lacking certainty and in presenting several issuable facts by the use of the disjunctive "or." *Ib.*

4. COMMON LAW. The common law rules relating to pleas in abatement have never been relaxed in this State. *Ib.*

5. GRAND JURY—PLEADING. Irregularities in the method of selecting, returning, or organizing the grand jury, are not waived by one bound up to the County Court to answer such indictment as might be found against him, by failure to challenge an objectionable grand juror at or before the organization of the panel. Objection to such irregularities may be raised by plea in abatement at or before the time the accused pleads to the indictment. *Ib.*

6. COUNTY COURT, DISCRETION OF—GRAND JURY—TALESMAN. The County Court, in the exercise of reasonable discretion, can discharge a grand juror for other than statutory causes and substitute a talesman, who is competent to act; thus, there being a question whether one of the grand

jurors was qualified, the court discharged him and substituted a talesman; *Held*, that there was no error, although it was finally decided that the discharged grand juror was qualified. *Ib.*

7. ACT OF 1884, NO. 111. Under the Act of 1884, No. 111, s. 1, which provides that a person drawn to serve as a grand juror shall be disqualified from again serving "for two years from such drawing," *it was held*, that the disqualification commenced at the time of drawing, and not at the time of serving. *Ib.*

8. CLERK OF COUNTY COURT—WARRANT. The powers of the clerk of the County Court are *quasi* judicial; and he has authority under the statute,—R. L. s. 819,—to issue in term time or vacation, as circumstances may require, a warrant, in due course, without an express order from the judges, for the arrest of a person indicted, and for his detention for trial at the next term of the court. *In re Durant*, 176.

9. WARRANT. It is not necessary that a warrant issued for the arrest of a person indicted, and for his detention for trial, should specify with particularity the accusation in the indictment; thus, a warrant is not defective, which was issued for the arrest of a person under indictment where its language was "to answer to a complaint charging him with the crime of perjury." *Ib.*

10. WARRANT ISSUED IN VACATION—BAIL. A person indicted for perjury may be lawfully committed to jail on a warrant issued in vacation for his arrest and detention for trial; but he is entitled to give bail. *Ib.*

11. ARREST IN ONE COUNTY, COMMITMENT IN ANOTHER. The prisoner was arrested in one county and committed to jail in another county, where he was under indictment for perjury. In a few days afterwards he was discharged, but was immediately re-arrested by the same officer on another warrant issued for his detention for trial; *Held*, that if the first commitment was illegal under the statute,—R. L. s. 1459,—it did not affect the legality of the second commitment. *Ib.*

12. COPIES OF APPEAL—CONSTITUTIONAL LAW. The legislature has authority to make reasonable laws regulating the mode in which the right of trial by jury in criminal causes shall be enjoyed; but it cannot impair the right; thus, a statute which in effect requires a prisoner convicted in a justice's court, where a jury is composed of only six men, to procure copies of appeal at his own expense, if he appeals and would enter his appeal in the County Court, where a jury is composed of twelve men, is a reasonable regulation, and does not infringe the constitutional right of trial by jury. *In re Marron*, 199.

13. CHALLENGE. A respondent's right under the statute,—R. L. s. 1653,—to challenge peremptorily continues until the juror is sworn,—even if he had accepted the juror. *State v. Spaulding*, 228.

14. EVIDENCE—EXAMINED COPY. In a prosecution for the illegal sale of liquor, a copy of the assessment rolls kept in the office of the collector of internal revenue, showing that the respondent had a United States license for the sale of liquor, is admissible to prove that he did sell, although the copy was made by one who was not connected with the

office, but who testified that he made it after examination of the records. *Ib.*

15. PRACTICE—SECOND OFFENSE. The respondent was indicted for the illegal sale of liquor, and a prior conviction for a like offense was charged: the jury merely found that he was guilty of one offense; and the sentence was respited in the court below, and his exceptions sustained; *Held*, that there was no question in respect to the sentence before the court. *Ib.*

16. PRACTICE—QUESTION TO JUROR AS TO EVIDENCE OF ACCOMPLICE. It was not error to allow counsel for the State to ask jurors whether they would disregard the testimony of an accomplice. *State v. Flint*, 304.

17. PEREMPTORY CHALLENGE. The order in which peremptory challenges shall be exercised rests in the discretion of the trial court. *Ib.*

18. DECLARATIONS, EXCEPTION AS TO ADMISSION. There is an exception to the rule, that proof of declarations made by a witness out of court is not admissible in corroboration of his testimony; namely, when an attempt is made to discredit a witness on the ground that he is under the influence of some motive to make a false statement in consequence of his relation to the party or to the cause, it is proper to show that he made a similar statement before the relation existed. *Ib.*

19. But where it was claimed that a witness had become confused and led into making contradictory statements on re-cross-examination, proof was not admissible to show that his testimony given at a former trial was the same as that given in his examination in chief at the last one. *Ib.*

20. ACCOMPLICE. Where an accomplice testified in the court of examination, just after the crime had been committed, to a conversation had with the respondent just before it had been committed, and also testified to the same conversation in the court below, and the respondent claimed that he had made up his story from information derived from some late source, *it was held*, that the accomplice's testimony given at the preliminary hearing, was admissible, not in corroboration, but as tending to show that he had previous knowledge. *Ib.*

21. It being important to determine how much time was required for a man to travel the distance between a certain hotel and the place where the crime was committed, testimony relating to this question, given by those who passed over it for the purpose of being witnesses, was admissible. Dissimilarity in conditions would only go to its weight. *Ib.*

22. Evidence of the notoriety of a crime is admissible to prove that the respondent knew of it at a time when he claimed that he had not heard of it; but if incompetent it would become harmless on failure of the attempt to show such fact. *Ib.*

23. The evidence in behalf of the State tended to show that the respondent eluded his bail; the respondent, to rebut the presumption of guilt arising from concealment, used his bail as a witness, who testified that he advised him to go away to escape a civil suit for damages, and that he then *believed* he would come back; *Held*, that it was not legal error to allow the inquiry on cross-examination as to what he *thought* about his coming back after he, the bail, had got a bench warrant for him. *Ib.*



24. OFFICER. The fact that an officer having charge of the jury in a case in which he was a witness, was present during their deliberations after it had been submitted to them, is not sufficient cause for setting aside a verdict although it was an impropriety, and another officer ought to have been selected. *Ib.*

25. FORMER CONVICTION—FRAUD—JUSTICE OF PEACE. A former conviction rendered by a justice of the peace against one for intoxication on his own complaint is not a bar to a prosecution previously instituted by the state's attorney for the same offense, although the fine is determined by the statute. A formal complaint was necessary to confer jurisdiction on the magistrate. *State v. Wakefield*, 618.

26. JURISDICTION defined. *Ib.*

CROSSING, RAILROAD. *See* RAILROAD 2, 6.

DATE. *See* LIMITATIONS, STATUTE OF, 8; ANIMALS 5.

#### DAMAGES.

1. LEX LOCI REI SITAE GOVERNS. In an action for breach of covenant of warranty, where the grantor resided in Vermont, the grantee in New Hampshire, and the land was situated in Minnesota, the construction of the contract, including the rule as to damages, is governed by the law of the place where the land is situated; and, although the plaintiff was entitled to a judgment, yet, the referee having failed to find, as a fact, what that law is, the court declined to presume that it was the same as the law of this State, and recommitted the case for the court below to determine the damages according to the above rule. *Tillotson v. Prichard*, 94.

2. In an action against a marble company for depositing sand in a stream whereby a sand-bar was formed and the plaintiff's land was flooded, he is entitled to recover for all injuries to his crops and land, which were occasioned by the defendant's unlawful acts committed before the commencement of the suit, including the effects of such acts, which became apparent subsequent to the commencement. *Goodrich v. Dorset Marble Co.*, 280.

3. It is the duty of one injured in his estate by the fault of another to use all reasonable means to protect himself against injurious consequences; thus, the defendant obstructed the plaintiff's drain, and the plaintiff could have indemnified himself for \$25, but by delaying to repair, the damages amounted to \$100; *Held*, that the legal measure of damages was \$25. *Lloyd v. Lloyd*, 288.

4. OPINION. In an action against a physician for unskillful professional treatment, the plaintiff's opinion is not admissible on the question of damages, when he is able to describe all the facts bearing upon that question. *Bain v. Cushman*, 343.

*See* COVENANT 9; PLEADING 9; BANKRUPTCY; NEGLIGENCE; MUNICIPAL CORPORATION.

DEBTOR, ABSCONDING. *See* BAIL.

DECEIT. *See* SALE 7.

DECLARATIONS. *See* SALE; EVIDENCE.

DEMAND. *See* AGENCY; BANKRUPTCY 3; CONTRACT 4; SALE 2.

## DEED.

1. DEED, WIFE OF GRANTEE WITNESS TO. The plaintiff's wife was a witness to the deed: by the law of Minnesota she was competent and could be examined with the consent of her husband; the deed was not objected to on the ground that it was defectively executed; *Held*, that the deed was legitimate evidence to show an assignment of the land to the plaintiff; and *quære* whether a deed defectively executed is not good between the parties. *Tillotson v. Prichard*, 94.

2. RESERVATION IN. A reservation in a warranty deed of land of the crops that might be produced thereon, to secure the interest on the purchase money, is a valid lien and may be foreclosed. *Darling v. Robbins*, 347.

3. ASSIGNEE'S DEED. And an assignee's deed, which contained these words, "*subject to the mortgagor's homestead right*," was construed to mean such right as he had against the order of assignment; and it was held, that, if the deed did not convey the homestead, it still remained vested in the assignee for the payment of such debts. *Tilden v. Crimmins*, 546.

*See* FRAUDS, STATUTE OF; COVENANTS; HOMESTEAD 8.

DEED, when a mortgage. *See* CHANCERY 4, 9.

DEPUTATION. *See* SHERIFF.

## DIVORCE.

A marriage may be annulled when it has been procured by duress: thus, a marriage was annulled on proof that the consent of the petitioner, a boy sixteen years old, was extorted by bastardy proceedings, maliciously instigated by the petitionee without probable cause. *Shoro v. Shoro*, 268.

*See* HOMESTEAD 4.

DOG. *See* ANIMALS.

DRAIN. *See* DAMAGES 3.

DURESS. *See* DIVORCE.

EASEMENT, distinguished from license. *See* CHANCERY 22.

## EJECTMENT.

One is liable in an action of ejectment for a projection of his roof over another's land. *Murphy v. Bolcher*, 723.

*See* LANDLORD AND TENANT 1.

ENDORSEMENT. *See* BILLS AND NOTES.

ENGINEER, may be arrested when conducting train. *See* RAILROAD: ACTION ON THE CASE.

EQUITABLE ESTOPPEL. *See* CHANCERY 18.

EQUITABLE LIEN. *See* CHANCERY 2, 5; DEED 2.

ESTATES, SETTLEMENT OF. *See* EXECUTORS AND ADMINISTRATORS.

ESTATES, INSOLVENT. *See* BANKRUPTCY; TRUST COMPANY; HOMESTEAD; CHANCERY.

ESTOPPEL BY JUDGMENT. *See* TRUST COMPANY 2.

ESTOPPEL.

1. The doctrine of estoppel does not apply; as it does not appear that the railroad company was misled in reliance upon the action of the town, or knew what the town did in making repairs on the approaches. *Rosbury v. The Cen. Vt. R. R. Co.* 121.

2. Evidence was offered to show that the plaintiff, just before the mortgage was recorded, told the mortgagee that he must abandon his mortgage, and that he replied that it was good for nothing, as it had not been recorded; *Held*, that the offer lacked several of the essential elements of an estoppel *in pais* as it was not proved that the plaintiff performed any act in reliance upon the reply; and there was no error in rejecting it. *Gilbert v. Vail*, 261.

*See* CHANCERY 18; RAILROAD.

ESTRAYS.

1. The requirements of the statute,—R. L. s. 4053,—relating to the rights and duties of the finder of a stray beast, must be strictly complied with; thus, in an action to replevy a colt, which the finder had taken and sold at public auction under the statute as a stray beast to the defendant, *it was held* that a joint owner could recover, on the ground that the description of the estray in the advertisement was insufficient, and also that the advertisement was not seasonably recorded in the town clerk's office. *Chaffee v. Harrington*, 718.

2. The statute requires that a person who finds a stray beast shall advertise the same within six days; *Held*, that the day when the advertisements were posted, is excluded in the computation of the time. *Ib.*

EVIDENCE.

1. GENERAL OBJECTION. A general objection to all the evidence relating to a land tax sale is not available as an objection to a certain paper. 79.

2. POSSESSION. The payment of taxes assessed on land is neither an act of possession nor evidence of a possessory title. *Tillotson v. Prichard*, 94.

3. SURVEYOR. There was no error in allowing a surveyor in testifying to use a plan of the lands in contention, although it was in part a copy of the government survey. *Ib.*

4. DEED, WIFE OF GRANTEE WITNESS TO. The plaintiff's wife was a witness to the deed; by the law of Minnesota she was competent and could be examined with the consent of her husband; the deed was not objected to on the ground that it was defectively executed; *Held*, that the deed was legitimate evidence to show an assignment of the land to the plaintiff; and *quære* whether a deed defectively executed is not good between the parties. *Ib.*

5. DECLARATIONS OF PARTY EVICTED. The declarations of the party who evicted the plaintiff, and also of his workmen cutting timber on the land, were admissible to show an eviction. *Ib.*

6. EVIDENCE—EXAMINED COPY. In a prosecution for the illegal sale

of liquor, a copy of the assessment rolls kept in the office of the collector of internal revenue, showing that the respondent had a U. S. license for the sale of liquor, is admissible to prove that he did sell, although the copy was made by one who was not connected with the office, but who testified that he made it after examination of the records. *State v. Spaulding*, 228.

7. CHATTEL MORTGAGE—JURAT. In an action of replevin between the representative of the mortgagee and the vendee of mortgagor's assignee, involving the validity of a chattel mortgage, the *jurat* annexed to the affidavit is conclusive as to whether the parties to the mortgage were sworn. *Gilbert v. Vail*, 261.

8. It was not error to reject evidence that the notes indorsed by the mortgagee had been proved against the insolvent estate before he had taken them up. *Ib.*

9. PAROL. Parol evidence is admissible to prove the true relation between indorsers; and an apparent surety may be shown to be a principal, and an apparent principal a surety. *Martin v. Marshall*, 321.

10. PAROL. In an action against a village for injuries resulting from the negligence of its employee in piling tiles, parol evidence was admissible to prove that the defendant neither owned nor controlled them, although they had been shipped to the defendant, and a bill of them had been rendered to it, and allowed by the president of its board of trustees. *Palmer v. St. Albans, Village of*, 427.

11. PAROL. Parol evidence was admissible to prove that a license had been issued by the secretary of state to a foreign insurance company to do insurance business, when the loss of the license was shown, and there was no law requiring it, or the fact that it had been issued, to be recorded. *Ins. Co. v. Wright*, 515.

12. PAROL—FOREIGN LAW. In an action by a Pennsylvania insurance company to recover an assessment, one question was, whether the company, under the laws of that state, was responsible for the acts and neglects of its agents, and the court below found from testimony, as matter of fact, that the law of that state was as reported in certain cases in its Supreme Court Reports, which were referred to as part of the exceptions, and rendered judgment for the plaintiff. The cases showed that the company was liable for the neglects of its agents, which under our statute, enabled it to do business here. *Held*, that there was no error. *Ib.*

13. OPINION. In an action against a physician for unskillful professional treatment, the plaintiff's opinion is not admissible on the question of damages, when he is able to describe all the facts bearing upon that question. *Bain v. Cushman*, 343.

14. DECLARATIONS. The declarations of a real party against the validity of a claim, though made before he became the owner of the claim, are admissible and competent evidence as tending to prove a defence in a suit founded upon such claim; and it is error to limit the declarations to merely impeaching testimony. *Barber v. Bennett*, 662.

15. **MARRIED WOMAN.** A married woman is a competent witness in favor of her husband to testify to the terms of a contract, where the parties had no personal interview in making it, and she acted as the agent of both, of the defendant in carrying his proposition to her husband, and of her husband in carrying his acceptance to the defendant. *Martin v. Hurlburt & Tr.* 364.

16. **BOOK ACCOUNT.** In an action against a deceased person's estate, the plaintiffs' accounts on book, with proof of the handwriting and when made, are evidence under the statute (R. L. s. 1004), tending to show a sale and delivery of the goods in dispute; and the auditor's decision as to how much weight should be given to them, and whether they are sufficient to entitle the plaintiff to recover, is conclusive. *Greene v. Mills' Est.* 440.

17. **GIFT—RES GESTÆ.** In an action of trover in favor of an administrator, where the defence was a gift by the intestate of the articles in contention, the reason assigned by the defendant for refusing to return them, on demand; namely, that they had been given him, was not admissible as a part of the *res gestæ*; for it was only a narration of a completed transaction. *Ross v. White*, 558.

18. **IMMATERIAL—PRACTICE.** If evidence is legitimate when it is received, its admission is not error, although in the course of the trial it becomes immaterial. *Giftin v. Barr*, 599.

19. **UNANSWERED QUESTION—PRACTICE.** Error will not be found in an unanswered question put to a witness. *Smith v. Insurance Co.* 682.

*See* BANKRUPTCY; TAXATION 23, 24; COVENANT 11; CHANCERY 4; WATER COURSE 6; ANIMALS 2; REPLEVIN 1; WILL 2; PRACTICE; TRIAL OF CIVIL ACTIONS; CRIMINAL LAW; WITNESS.

### EXCEPTIONS.

1. An exception to the rendition of a judgment upon a special verdict does not reach back to a question, whether raised or not on trial, to which no exception was reserved, and which it is not necessary to determine in order to render a valid judgment. Thus, in such case it was held that whether the court erred in omitting to submit to the jury questions and instructions which ought to have been submitted was not open to review. *Goodenough v. Huff*, 53 Vt. 482, distinguished. *Farrant v. Bates*, 37.

2. The court will pass upon an exception as it stands, though apprehensive that by inadvertence it does not present the question just as it came up in the court below. *Fulham v. Howe*, 351.

3. A statement in exceptions that a certain fact *appeared* is equivalent to stating that there was no controversy in regard to it. *Amsden v. Floyd & Blaisdell*, 386.

*See* CHATTEL MORTGAGE 12.

EXECUTION, court can stay. *See* COVENANTS 5.

EXEMPLARY DAMAGES. *See* PLEADING 10.

EXPECTANCY. *See* CHANCERY 14.

## EXECUTORS AND ADMINISTRATORS.

1. OFFSET. Under the statute,—R. L. s. 2127,—in an action against the estate of the deceased person, claims in offset are limited to such as existed at the time of the death of the intestate; otherwise, the due course of distribution would be altered. *Hatch v. Hatch's Est.* 160.

2. The plaintiff's husband devised a farm in unequal portions to her and to her two minor children, her son and the defendant's intestate. After the death of the husband the mother rented the farm for several years on the shares, but she and the children lived thereon out of a common fund. The three constituted the family; and there was no understanding that any separate account should be kept, or separate contribution made towards their common support except the expenses of the intestate when at school; *Held*, in an action against the estate to recover for money loaned the intestate to complete her education, that the rent of the farm could not be allowed in offset. *Ib.*

3. EXECUTOR, REMOVAL OF—APPEAL. Under the statute,—R. L. s. 2065,—an executor has the right of appeal from an order of the Probate Court removing him and appointing an administrator in his place. *In re Bellows' Est., Soles, App't*, 224.

4. AGENCY—INTEREST. When a financial agent or attorney mixes the money of his principal with his own by depositing it in his general bank account, and draws it out and uses it in his own business, it is presumed that he has gained a benefit, and on failure to show how much he has derived from the use, he is chargeable for interest. *Blodgett's Estate v. Converse's Estate*, 410.

5. In such case, a request to settle, with an expressed willingness by the agent, but a neglect to do so, because neither party was quite ready to attend to it, is not equivalent to a demand for payment. *Ib.*

6. When an agent has interest-bearing securities in his possession belonging to his principal, the law presumes that he received the interest thereon; the burden is on him to prove that he had not received it; and without an explanation sufficient to relieve him from payment he is chargeable with the interest. *Ib.*

7. EXECUTOR DE SON TORT. A married woman died testate, and in a short time her executrix deceased. No steps were taken for some time to have the will proved, and the husband of the testatrix had her estate in his hands. It was not found that the delay was caused by his fault; *Held*, that he could not be treated as an executor *de son tort*; and that he should only be held to exercise the care of a faithful agent. *Ib.*

8. ADMINISTRATOR CHARGEABLE WITH WHAT. The administrator was licensed to sell the real estate at public or private sale, and sold it at public auction to the highest bidder; but before making the deed he was informed that he could sell it for more than the auction price, and although no memorandum had been made, believing that the sale was binding upon him, he consummated it. Neither bad faith nor neglect of duty was found; *Held*, that he was chargeable with only what he received for the land. *In re Worcester's Estate*, 420.

9. **HOMESTEAD MORTGAGED.** When a homestead is a part of premises encumbered by a mortgage executed by a husband and his wife, it is under the burden of bearing its proportion of the mortgage debt. *Ib.*

10. **WIDOW.** A widow by consenting that the administrator of her deceased husband's estate might sell under order of court premises in which she has a homestead interest, does not waive her rights to the homestead fund. *Ib.*

11. But the court declined to decide whether the administrator could use the homestead fund to pay the expenses of this appeal, which was taken by the widow from the order of the Probate Court allowing his account, as that question is not before the court. *Ib.*

12. **GIFT—EVIDENCE—RES GESTÆ.** In an action of trover in favor of an administrator, where the defence was a gift by the intestate of the articles in contention, the reason assigned by the defendant for refusing to return them, on demand, namely, that they had been given him, was not admissible as a part of the *res gestæ*; for it was only a narration of a completed transaction. *Ross v. White*, 558.

12. **JURISDICTION—ADMINISTRATORS WHEN NOT LIABLE TO BE SUED.** The jurisdiction of the Probate Court is exclusive in regard to all claims of an absolute or legal nature, when it has been once invoked for the settlement of an estate, and commissioners have been appointed thereon; thus, when a claim had been presented to commissioners by one of two joint contractors and there was an appeal, and it was ultimately decided that the suit could not be maintained on the ground of non-joinder of parties; *Held*, that the County Court had no jurisdiction of the same cause of action brought directly to that court against the administrators and after the commission on the estate had been closed. *Goff & Anyus v. Robinson*, 633.

*See* BOOK ACCOUNT; AGENCY; EVIDENCE 17; REPLEVIN; GUARDIAN; CHANCERY; MORTGAGE; HOMESTEAD.

**FALSE IMPRISONMENT.** *See* SHERIFF.

**FALSE REPRESENTATIONS.** *See* SALE.

#### FENCE.

Under the statute,—R. L. s. 3184,—one is not guilty of contributory negligence in turning his cattle into his pasture although he has knowledge that the division fence of an adjoining landowner is insufficient, and that if his cattle should escape into such owner's field they would be liable to injury; and in an action to recover for injuries to the plaintiff's cattle, evidence is not admissible in behalf of the defendant to prove such knowledge. *Eddy v. Kinney*, 554.

**FOREIGN INSURANCE CO.** *See* INSURANCE.

**FOREIGN LAW**, how proved. *See* INSURANCE.

**FORFEITURE OF CHARTER.** *See* TRUST COMPANY.

**FRAUD.** *See* DIVORCE; BANKRUPTCY; CHANCERY 14.

## FRAUDS, STATUTE OF.

1. There may be an adjustment and recovery on what has been done under a contract which was within the Statute of Frauds. Thus, the plaintiff, on the defendant's request made by letter, purchased a farm for him, but retained the title in himself as security for the price, and the defendant occupied it as owner for several years, paying some of the interest and a part of the taxes, making repairs, and then abandoned the farm; *Held*, (a) that the defendant in effect was a mortgagor in possession, and that his abandonment operated as a foreclosure; (b) and that the plaintiff was entitled to recover the excess of the debt above the value of the premises. *Adams v. Cooty*, 395.

2. The farm was encumbered with mortgages which the plaintiff assumed when he purchased it; *Held*, that as fast as he made a payment on them he had a right to charge it to the defendant as made at his request. *Ib.*

3. A reservation in the deed from the original owner to the plaintiff of waste water does not relieve the defendant, although there was nothing in the letter authorizing the purchase as to it,—as his taking possession of the premises was a ratification. *Ib.*

FRAUDULENT CONVEYANCE. *See* BANKRUPTCY; CHANCERY 9.

GIFT. *See* REPLEVIN; EXECUTORS AND ADMINISTRATORS 11.

GOVERNOR. *See* STATUTE.

GRAND JURY. *See* CRIMINAL LAW 5.

GRAND LIST. *See* TAXATION.

## GUARDIAN.

1. On the death of an insane ward, his administrator took possession of his estate with the consent of the guardian. The whole conduct of the guardian showed that he did not intend to retain a lien on the *corpus* of the property for what was due him, until after the sale of the property, when it appeared that the estate was insolvent; but he expected to be first paid out of the avails of what was sold; *Held*, (a) That, if the guardian ever had an equitable lien he had lost it; (b) That he had no lien on the homestead; for that also went into the possession of the administrator, with the guardian's consent. *Farr v. Putnam*, 54.

2. On a bill brought in such case to procure a foreclosure of the lien, the court declined to decide whether the guardian had a superior right to the avails of the property after its sale; or whether, on a bill properly drawn, he had such right. *Ib.*

GIFT. *See* EVIDENCE 17; REPLEVIN 3.

HIGHWAYS. *See* RAILROAD; MUNICIPAL CORPORATION.

## HOMESTEAD.

1. When a homestead is a part of premises encumbered by a mortgage executed by a husband and his wife, it is under the burden of bearing its proportion of the mortgage debt. *In re Worcester's Estate*, 420.



2. A widow by consenting that the administrator of her deceased husband's estate might sell under order of court premises in which she has a homestead interest, does not waive her rights to the homestead fund. *Ib.*

3. But the court declined to decide whether the administrator could use the homestead fund to pay the expenses of this appeal, which was taken by the widow from the order of the Probate Court allowing his account, as that question is not before the court. *Ib.*

4. DIVORCE—EFFECT ON HOMESTEAD. A married woman under our statute,—R. L. s. 1894,—loses her inchoate right to a homestead in the premises of her husband when she is divorced from him; and if in such case the custody of the minor children is decreed to her, they cease to be a part of their father's family, and lose all right to his homestead. *Heaton v. Sawyer*, 495.

5. And a mortgage executed solely by the husband is valid when the wife subsequently obtains a divorce; and, on his decease, if the custody of the children was decreed to her, neither she nor they have a homestead in the premises as against the mortgagee. *Ib.*

6. And where the wife and children on the granting of the divorce moved from the premises and were absent two years, it was held to be an abandonment of the homestead. *Ib.*

7. INSOLVENT LAW—ASSIGNMENT. The homestead of an insolvent debtor passes to his assignee on the assignment of his estate by the court, when such homestead is liable to be taken on execution in payment of debts contracted before the homestead was acquired; and in such case the assignee's deed may convey the homestead to one who has purchased the premises of him. *Tylden v. Crimmins*, 546.

8. ASSIGNEE'S DEED. And an assignee's deed, which contained these words, "*subject to the mortgagor's homestead right*," was construed to mean such right as he had against the order of assignment; and it was held, that if the deed did not convey the homestead, it still remained vested in the assignee for the payment of such debts. *Ib.*

9. COURT OF CHANCERY—JURISDICTION—PARTITION. The Court of Chancery has jurisdiction in partition cases involving the homestead, when its severance would greatly depreciate the value of the residue of the premises, although proceedings are pending in the Probate Court to set out the homestead; and that there may be an equality of partition, the court will determine in its discretion the manner of granting relief, either in accordance with the statute,—R. L. ss. 1908-9,—or in ordering the payment of money by one to the other owner. *Lindsey v. Brewer*, 627.

10. PLEADING. A bill brought under section 1908, R. L., for relief, where a severance of the homestead would greatly depreciate the value of the residue of the premises, is defective, if it does not allege that the value of the property exceeds \$1,000; but a bill with such defect is amendable. *Ib.*

11. MARRIED WOMAN—DESERTION OF HUSBAND. The fact that a married woman has deserted her husband and is living separate from him at

the time of his decease, does not deprive her of a homestead in his premises. *Ib.*

See GUARDIAN.

### HUSBAND AND WIFE.

1. A married woman is a competent witness in favor of her husband to testify to the terms of a contract, where the parties had no personal interview in making it, and she acted as the agent of both, of the defendant in carrying his proposition to her husband, and of her husband in carrying his acceptance to the defendant. *Martin v. Hurdhust & Tr.* 364.

2. A married woman died testate, and in a short time her executrix deceased. No steps were taken for some time to have the will proved, and the husband of the testatrix had her estate in his hands. It was not found that the delay was caused by his fault; *Held*, that he could not be treated as an executor *de son tort*; and that he should only be held to exercise the care of a faithful agent. *Blodgett's Est. v. Converse's Est.* 410.

See HOMESTEAD; DIVORCE; GUARDIAN; AGENCY; EXECUTORS AND ADMINISTRATORS; EVIDENCE 15.

IMPLIED PROMISE. See CONTRACT; LANDLORD AND TENANT 2.

### INFANT.

1. RATIFICATION. A contract by which a debt is incurred by an infant may be ratified by his express promise to pay it, made after he becomes of age; and his acts and declarations, made or performed after he has attained his majority, with deliberation and knowledge of his rights, may be of a character to constitute perfect evidence of such ratification. *Hatch v. Hatch's Estate*, 160.

2. When a person on attaining his majority promises to pay a debt which he had contracted during his infancy, in the absence of any proof to the contrary, it would seem to be the natural presumption that he was aware of his rights. *Ib.*

3. PARENT AND CHILD. A widowed mother cannot recover of the estate of her deceased daughter for an organ bought at the daughter's request made when she was about sixteen, and while living at the mother's home in the relation of parent and child, and there was no express promise to pay and nothing to distinguish it from the ordinary case where a parent indulges the request of a child. *Ib.*

4. Nor can such mother recover for nursing at her own home her daughter in sickness, although she was more than eighteen years old, but constituted one of the mother's family, and there was no understanding that charges should be made; nor for the payment of a physician's bill incurred by the daughter's illness; nor for the burial expenses of the deceased daughter,—as these last belong to the administrator to pay. *Ib.*

5. OFFSET. Under the statute,—R. L. s. 2127,—in an action against the estate of the deceased person, claims in offset are limited to such as existed at the time of the death of the intestate; otherwise the due course of distribution would be altered. *Ib.*

6. The plaintiff's husband devised a farm in unequal portions to her and to her two minor children, her son and the defendant's intestate. After the death of the husband the mother rented the farm for several years on the shares, but she and the children lived thereon out of a common fund. The three constituted the family; and there was no understanding that any separate account should be kept, or separate contribution made towards their common support except the expenses of the intestate when at school; *Held*, in an action against the estate to recover for money loaned the intestate to complete her education, that the rent of the farm could not be allowed in offset. *Ib.*

7. The court declined to change the decision of the court below, in refusing to recommit the report,—on the ground that the record did not show error. *Ib.*

8. COSTS. On an appeal from the decision of commissioners, where their allowance was greatly decreased, the costs were properly apportioned. *Ib.*

INCORPORATED VILLAGE. *See* MUNICIPAL CORPORATION.

INDORSER. *See* BILLS AND NOTES.

INJUNCTION. *See* HOMESTEAD; CHANCERY.

INNOCENT HOLDER. *See* BILLS AND NOTES.

INNOCENT PURCHASER. *See* CHATTEL MORTGAGE.

INQUIRY, PUT ON. *See* BILLS AND NOTES.

INSANITY. *See* PAUPER; CHANCERY 14.

INSOLVENCY. *See* BANKRUPTCY; CHATTEL MORTGAGE; TRUST COMPANY; HOMESTEAD.

#### INTEREST.

1. When a financial agent or attorney mixes the money of his principal with his own by depositing it in his general bank account, and draws it out and uses it in his own business, it is presumed that he has gained a benefit, and on failure to show how much he has derived from the use, he is chargeable for interest. *Blodgett's Estate v. Converse's Estate*, 110.

2. In such case, a request to settle, with an expressed willingness by the agent, but a neglect to do so, because neither party was quite ready to attend to it, is not equivalent to a demand for payment. *Ib.*

3. When an agent has interest-bearing securities in his possession belonging to his principal, the law presumes that he received the interest thereon; the burden is on him to prove that he had not received it; and without an explanation sufficient to relieve him from payment he is chargeable with the interest. *Ib.*

*See* LIMITATIONS, STATUTE OF, 3; CONTRACT 3.

INTERPLEADER, BILL OF. *See* CHANCERY 14.

INTOXICATING LIQUOR. *See* CRIMINAL LAW.

#### INSURANCE.

1. Parol evidence was admissible to prove that a license had been issued by the secretary of state to a foreign insurance company to do insurance

business, when the loss of the license was shown, and there was no law requiring it, or the fact that it had been issued, to be recorded. *Lycoming Fire Ins. Co. v. Wright*, 515.

2. It is presumed that a foreign insurance company duly filed in the office of the secretary of state a copy of its by-laws, when it was proved that the secretary had issued to the company a license to make insurance contracts, and the statute provided that no license should be issued until such copy had been filed; as it must be presumed, until the contrary is shown, that the secretary of state did his duty, and would not have issued the license unless the company had complied with the law. *Ib.*

3. In the Act of 1874, No. 1, s. 2, which prohibited a foreign insurance company from taking insurance in this State unless it was "responsible by the laws of the state" in which the company was situated for the acts and neglects of its agents, the word "laws" includes not only the statutory, but the common law of that state. *Ib.*

4. In an action by a Pennsylvania insurance company to recover an assessment, one question was, whether the company, under the laws of that state, was responsible for the acts and neglects of its agents, and the court below found from testimony, as matter of fact, that the law of that state was as reported in certain cases in its Supreme Court Reports, which were referred to as part of the exceptions, and rendered judgment for the plaintiff. The cases showed that the company was liable for the neglects of its agents, which, under our statute, enabled it to do business here; *Held*, that there was no error. *Ib.*

5. INCUMBRANCE—UNDISCHARGED MORTGAGE. An undischarged mortgage, which has been paid, is not an incumbrance on property insured. *Smith v. The Niagara Ins. Co.* 682.

6. WARRANTY. The assured warranted that they had "not omitted to state to the company any information material to the risk." At the time the insurance was taken there was an undischarged mortgage on the property, but the mortgagee had voluntarily destroyed the note secured by it, which was not known by the assured; *Held*, that a failure by the assured to state that they believed that the property was mortgaged was an omission of a statement material to the risk; or, at least, it was evidence from which that might have been found. And if it was a question of law, a verdict should have been ordered for the defendant; if of fact, it should have been submitted to the jury with proper instructions. *Ib.*

7. AGENT. A general agent of an insurance company, who has a supervision of all its affairs, unless restricted in his power, and this is known to the plaintiff, has authority to waive a statement of the loss, although by the terms of the policy that was a condition precedent to recovery. *Ib.*

8. But a local agent, who never had been held out by the company as possessing any authority, except to receive proposals for insurance, fix rates of premium and issue policies, has no power to waive the condition of a policy requiring a statement of loss; and there was error in the charge, when the jury were at liberty to find a waiver from the declarations of either the local or general agent. *Ib.*

9. **WAIVER.** But the general agent cannot waive the statement of loss in a manner other than that provided for in the policy; thus, he cannot give an oral consent to a waiver, when by the terms of the contract the waiver must be indorsed on the policy. *Ib.*

**JUDGMENT, ESTOPPEL BY.** *See* TRUST COMPANY.

**JUDGMENT,** exception to rendition of. *See* EXCEPTION.

### JURISDICTION.

Section 973, Rev. Laws, which provides that when a writ fails for matter of form, etc., the plaintiff may commence a new action for the same cause within one year, has no application to the subject of jurisdiction, but is simply a modification of the Statute of Limitations. *Goff & Angus v. Robinson*, 633.

*See* RAILROAD 1; CHANCERY: EXECUTORS AND ADMINISTRATORS; AMENDMENT.

**JURISDICTION,** defined. 618.

**JURAT.** *See* CHATTEL MORTGAGE 3.

**JURY, QUESTIONS FOR.** *See* WATER COURSE AND WATER RIGHTS 6; INSURANCE.

**JURY TRIAL.** *See* CRIMINAL LAW 12.

### JURY.

1. Alienage is a disqualification of a juror; and a verdict rendered by jurors, when one of them was an alien, will be set aside on motion of the defeated party, if the disqualification was unknown to him and his counsel. *Richards v. Moore*, 449.

2. Prior alienage is presumed from naturalization; thus, when one was naturalized after he acted as a juror, it was presumed that he was an alien before he acted; especially when it was found that he became a citizen by naturalization, and was of foreign birth. *Ib.*

3. The burden is on the defendant to show the alienage of the juror. *Ib.*

4. The affidavits of jurors are not admissible in support of a petition for a new trial, to impeach their verdict. 486.

**JUROR, CHALLENGE OF.** *See* CRIMINAL LAW.

### JUSTICE OF THE PEACE.

1. In *assumpsit*, where the writ issued under the statute—R. L. s. 1478—as a *capias* against an absconding debtor, the defendant was bail for the debtor, and, on the return day, surrendered him into court, and was discharged. The justice of the peace before whom the case was pending, after a rendition of judgment and a partial hearing as to the debtor's situation and property, continued the case at the debtor's request for a further hearing in this respect, and at the same time took the defendant's recognizance for his appearance; *Held*, (a) That the recognizance was valid; (b) That it was valid although larger than the judgment; (c) That the defendant could surrender the debtor in discharge of himself. *Worthen v. Prescott*, 68.

2. The defendant was the same as special bail, or bail above, at common law; and he could at any time or place, without a bail-piece, have apprehended the debtor, even on Sunday, or in his dwelling, or in another jurisdiction. In law he was the debtor's jaffer. *Ib.*

*See CRIMINAL LAW 25.*

#### LANDLORD AND TENANT.

1. In an action under the justice ejectment act—R. L. s. 1321—a lessor is entitled to a judgment without demand of rent in arrears or notice to quit after breach of the stipulations in a written or verbal lease as to the payment of rent. *Horan v. Thomas*, 325.

2. The defendants in May, 1885, commenced under a parol lease to occupy the plaintiff's premises at an agreed rent of \$45 per month, and in March, 1886, he notified them that if they continued after that month they must pay \$60 per month: *Held*, that the tenancy was one at will under the statute,—R. L. s. 1932,—and that the said notice terminated it: and that the plaintiff was entitled to recover \$60 per month after March, 1886, on an implied promise. *Amsden v. Floyd & Blaisdell*, 386.

3. A tenant at will, after notice to quit, has a reasonable time to vacate the premises and procure other accommodations, depending upon the circumstances. *Ib.*

*See FRAUDS, STATUTE OF.*

LAW, of another state, how proved. *See INSURANCE.*

LAW, COMMON. *See CRIMINAL LAW.*

LEGISLATURE, POWER OF. *See CRIMINAL LAW 12.*

LEGATEE. *See WILL: EXECUTORS AND ADMINISTRATORS.*

LESSOR—LESSEE. *See LANDLORD AND TENANT.*

LEASED PROPERTY. *See TAXATION 24.*

LEX LOCI REI SITE. *See COVENANT 9.*

LICENSE—EASEMENT, distinguished. *See CHANCERY.*

LIEN, EQUITABLE. *See CHANCERY 2, 5.*

LIEN, VENDOR'S. *See CHATTEL MORTGAGE.*

#### LIMITATIONS, STATUTE OF.

1. The defendant cannot protect itself against the liability on the ground that the Statute of Limitations would bar an action for the original obstruction; for the obligation and the negligence were continuing. *Robbary v. The Cen. Vt. R. R. Co.*, 121.

2. A payment that will operate to revive a debt barred by the Statute of Limitations must be a voluntary one, and made with the intent that it should be applied upon such debt. *Corliss & Way v. Groor*, 58 Vt. 702, distinguished. *Austin v. McClure*, 453.

3. AGENT. If A enters into a valid contract with B to pay his demand note, but there is not a novation of the parties to the note, and pays the interest annually in accordance with his agreement, such payment

has the same effect in respect to the Statute of Limitations as though made by B himself. *Huntington v. Chesmore*, 566.

4. SECTION 973, REV. LAWS, which provides that when a writ fails for matter of form, etc., the plaintiff may commence a new action for the same cause within one year, has no application to the subject of jurisdiction, but is simply a modification of the Statute of Limitations. *Goff & Angus v. Robinson*, 633.

5. PRESUMPTION. The payment of a mortgage note is not presumed until fifteen years have elapsed after the note had matured. *Smith v. The Niagara Ins. Co.* 682.

6. INDORSEMENTS. An indorsement upon a note, though not in the handwriting of the payor, is some, but not sufficient evidence of payment, and may be weighed in determining whether a payment in fact had been made, as bearing upon the Statute of Limitations. The party who made the indorsement was properly allowed to testify to the circumstances attending the making of it. *Lawrence v. Graves*, 657.

7. DATE. Under the statute,—R. L. s. 26,—which provides, that when time is to be reckoned from a day or date, or act done, such day, date, etc., shall not be included in the computation, the day upon which a payment was made upon a promissory note, is excluded in determining whether the Statute of Limitations is a bar. *Hicks v. Blanchard*, 673.

8. PAYMENT. Payments, not made upon the general account, but to apply upon specific items, do not prevent the operation of the Statute of Limitations. *Ib.*

9. MANNER OF KEEPING BOOK.—The manner in which an account is kept is unimportant in its bearing as to the operation of the statute: thus the plaintiff usually kept his account with the defendant on a large book and with apparent care; but during three months of one year he furnished feed for his horses, and at the same time the defendant delivered to him 140 lbs. of pork, and these items, both debt and credit, were kept on a diary, showing a balance due the defendant: *Held*, as there was no direction by the defendant, and no facts found by which the court could infer that he intended a different application, that the creditor could make the application upon any indebtedness of defendant. *Ib.*

LIST. *See* TAXATION.

LISTERS. *See* TAXATION 12.

LOST NOTE. *See* CHATTEL MORTGAGE 10; BILLS AND NOTES 4.

MAIL, U. S. *See* RAILROAD 10.

MAJORITY OF LISTERS. *See* TAXATION 12.

MASTER AND SERVANT. *See* MUNICIPAL CORPORATIONS; RAILROAD.

MARRIAGE, procured by duress. *See* DIVORCE.

MARRIED WOMAN, living separate from husband. *See* HOMESTEAD 10.

MARRIED WOMAN. *See* HUSBAND AND WIFE; AGENCY.

MASTER AND SERVANT. *See* MUNICIPAL CORPORATION.

**MAXIM:** *Sic utere tuo ut alienum non ledas.* 121.

“ *Respondeat superior.* 427.

**MENTAL CAPACITY.** *See* CHANCERY 14; PAUPER.

**MINOR.** *See* INFANT.

**MISTAKE.** *See* CONTRACT; CHANCERY 4, 20.

### MORTGAGE.

1. **VOLUNTARY SETTLEMENT.** A voluntary settlement, fully completed, cannot be annulled by the settlor, when it has been fairly made with knowledge of its effect, and no power of revocation is reserved; thus, the owner of real estate conveyed it to the defendant who executed a mortgage back, conditioned for the maintenance of the mortgagee and his wife and for the payment of \$1,000 within a reasonable time after their death, to each of their three children, if they survived their parents, and if they did not, then to the heirs of the deceased child. One of the three children having deceased, leaving two heirs, the mortgagor and mortgagee entered into a new agreement, by which these heirs were to receive less than they were entitled to under the mortgage; *Held*, that the effect was to create a trust in the grantee of the real estate and to vest in each of the children of the settlor a right to the sum of \$1,000, of which they could not be divested without their consent; and that the new agreement was inoperative and void. *Sargent v. Baldwin*, 17.

2. **MORTGAGE, FORECLOSURE OF.** A man made a voluntary conveyance of real estate in trust for himself, his wife and children, and the trustee executed a mortgage back to him, his heirs and assigns, to secure the performance of the trust, for the benefit of all the *cestuis que trust*; *Held*, that subsequent to the decease of the settlor and his wife, the heirs of a deceased child could maintain a petition in common form in their own names to foreclose the mortgage, although their claim was disputed and there was no assignment of the mortgage to them. *Ib.*

3. **PARTIES.** The administrator of the settlor's estate and the two surviving children should have been made parties; and an amendment was allowed that they might be joined. *Ib.*

4. When a mortgage is executed conditioned for the support of the mortgagee and his wife, and also for the payment of specified sums to his two daughters, the mortgagor and mortgagee cannot afterwards make a legal contract which injuriously affects the daughters, reaffirming *Sargent v. Baldwin*, ante, 17. *Howard v. Howard*, 362.

5. **HOMESTEAD.** When a homestead is a part of premises encumbered by a mortgage executed by a husband and his wife, it is under the burden of bearing its proportion of the mortgage debt. *In re Worcester's Est.* 420.

6. **DIVORCE, EFFECT ON HOMESTEAD.** And a mortgage executed solely by the husband is valid when the wife subsequently obtains a divorce; and, on his decease, if the custody of the children was decreed to her, neither she nor they have a homestead in the premises as against the mortgagee. *Heaton v. Sawyer*, 493.



7. And where the wife and children on the granting of the divorce moved from the premises and were absent two years, it was held to be an abandonment of the homestead. *Ib.*

8. DEED ABSOLUTE IN FORM, WHEN A MORTGAGE. A deed absolute in form, but given to secure a debt and also to cover the grantor's property for the purpose of preventing attachment, is a valid mortgage between the parties; and, on payment of the debt, the grantee will be ordered to reconvey, on the ground that he cannot take advantage of his own fraud upon others to defraud the grantor. *Still v. Buzzell*, 478.

9. PRESUMPTION. The payment of a mortgage note is not presumed until fifteen years have elapsed after the note had matured. *Smith v. The Niagara Ins. Co.* 682.

10. SEVERAL CONVEYANCES—INVERSE ORDER OF THEIR DATES. In case of several conveyances of parcels of land incumbered by a common mortgage the parcels are held to the duty of redemption in the inverse order of their dates; and this rule is applied in adjusting the rights of successive grantees. Thus, the owner of a farm with a mortgage on it conveyed the west half to one party by warranty deed and received pay therefor; *Held*, that as between them, the mortgage was shifted at the time of the severance on to the east half of the farm. *Deavitt v. Judevine*, 695.

11. Such owner subsequently conveyed the east half to another party, whose title came to the orator's intestate; *Held*, that she took only the title of such owner incumbered with the whole mortgage, as she purchased with notice, and was bound to know the law of contribution. And the rule is not varied by the fact that the first purchaser executed a mortgage on his portion of the farm to the original owner to secure a loan of money; nor by the fact that the present owner of the west half took collateral security to make good his grantor's covenants. *Ib.*

#### MORTGAGE, CHATTEL.

1. CHATTEL MORTGAGE. A chattel mortgage executed more than four months, but recorded only ten days, before the filing of a petition in insolvency against the mortgagor, is valid. R. L. ss. 1860, 1966. *Hilbert v. Vail*, 261.

2. AFFIDAVIT. An affidavit in a chattel mortgage is sufficient, which states that the mortgage was made "for the purpose of securing the debt specified in the condition thereof," where the condition showed that the mortgage was given to secure the mortgagee against liability as an endorser for the mortgagor. *Ib.*

3. JURAT. In an action of replevin between the representative of the mortgagee and the vendee of mortgagor's assignee, involving the validity of a chattel mortgage, the *jurat* annexed to the affidavit, is conclusive as to whether the parties to the mortgage were sworn. *Ib.*

4. EVIDENCE. It was not error to reject evidence that the notes endorsed by the mortgagee had been proved against the insolvent estate before he had taken them up. *Ib.*

5. ESTOPPEL. Evidence was offered to show that the plaintiff, just before the mortgage was recorded, told the mortgagee that he must abandon his mortgage, and that he replied that it was good for nothing, as it had not been recorded; *Held*, that the offer lacked several of the essential elements of an estoppel *in pais* as it was not proved that the plaintiff performed any act in reliance upon the reply; and there was no error in rejecting it. *Ib.*

6. ATTACHMENT OF MORTGAGED PROPERTY. When a creditor of a mortgagor attaches a part of his property covered by a chattel mortgage, and tenders to the mortgagee the amount due to him, and he accepts it and delivers the note and mortgage to the creditor, it effects an equitable assignment of the debt and mortgage. *Denno v. Nash*, 334.

7. REPLEVIN. And, if the creditor subsequently obtains an execution against the mortgagor and delivers it with the note and mortgage to an officer, who, under the creditor's directions, takes the property, a part attachable and a part not, into his possession, the mortgagor cannot maintain replevin for that which was exempt. *Ib.*

8. In such case, the court refused to decide whether the creditor had a right to apply any portion of the value of the non-attachable property in reduction of the mortgage debt, to enable him to satisfy his execution out of the excess. *Ib.*

9. REAL ESTATE MORTGAGE. A chattel mortgage of personal property is superior to a prior real estate mortgage in common form covering the same property, when the mortgagee in the chattel mortgage is in the position of an innocent purchaser. *Howard v. Witters*, 578.

10. VENDOR'S LIEN. When one sells personal property, and the title passes absolutely, an ordinary real estate mortgage of the same to secure the purchase money is not valid as a vendor's lien as to subsequent *bona fide* purchasers. *Ib.*

11. NOTE LOST. The loss of the note secured by a chattel mortgage after the property has been sold by an officer in behalf of the mortgagee, does not affect the legality of the seizure; and in an action of trover between innocent purchasers, involving the title to the property, the mortgage was admissible, and also testimony as to the loss. *Ib.*

12. USURY. In an action upon the act of 1882, No. 69, section 2, to recover the penalty and damages for failure to discharge a chattel mortgage, evidence was admissible to show the amount of usury in the mortgage note, as bearing on the question of payment of the note, and defendant's duty to discharge the mortgage. *Giffin v. Barr*, 599.

13. PENALTY FOR FAILURE TO DISCHARGE—PLEADING. In an action based upon section 2, No. 69, Acts of 1882, allowing for failure to discharge a chattel mortgage after performance of its condition, a recovery of "ten dollars for such neglect and all damages occasioned thereby," it is not necessary to declare in two counts, one for the penalty and the other for the damages; but a count including both, at most, would only be open to the fault of duplicity, which could only be taken advantage of by demurrer, and not by exception. *Ib.*

14. **DAMAGES.** Under the general allegation of "other damages," the plaintiff could recover only such as were the natural consequences of the defendant's refusal to discharge the mortgage; but he could not recover for damages resulting from the defendant's false declarations as to the mortgage. *Ib.*

15. **EXEMPLARY DAMAGES.** As the action is based upon the statute, which limits the damages to \$10, and all damages occasioned by the neglect to discharge the mortgage, exemplary damages are not recoverable. *Ib.*

16. **REMITTITUR.** The jury were allowed to give exemplary damages; but the plaintiff was permitted to hold his judgment for the penalty, on condition that he remitted all above \$10. *Ib.*

*See* FRAUDS, STATUTE OF; HOMESTEAD; CHANCERY.

**MORTGAGE, REAL ESTATE.** *See* CHATTEL MORTGAGE 9.

**MORTGAGE**, a deed when a mortgage. *See* CHANCERY 4, 9.

**MORTGAGEE**, in possession. *See* CHANCERY 11.

**MOTION TO DISMISS.** *See* PLEADING 6.

**MOTION TO QUASH.** *See* CRIMINAL LAW 2.

**MOTION TO RECOMMIT REPORT.** *See* REFERENCE.

**MOTION TO SET ASIDE VERDICT.** *See* JURY.

#### MUNICIPAL CORPORATION.

1. **RESPONDEAT SUPERIOR.** To charge one man with the negligence of another, it is not enough to show that the latter was in the employment of the former; but it must be shown that, in doing the act complained of, he was engaged in his master's business, acting within the scope of his employment, and that there existed between them the relation of master and servant, which is the foundation of the rule *respondent superior*. *Palmer v. St. Albans, Village of*, 427.

2. **SERVANT, NEGLIGENCE OF.** Thus, an incorporated village is not liable for injuries resulting from the negligence of one of its employees in piling tiles at the direction of the defendant's street commissioner in a yard occupied by it in storing its property, when the defendant village was not the owner of the tiles, and they were not in its custody or control, and the commissioner, taking advantage of his official position, was acting, as to the tiles, not as its servant, but as an individual for his private gain; and when the act did not amount to a nuisance, and a public trust was not involved. *Ib.*

3. The owner or occupant of real estate is not liable for injuries resulting from the negligent use of personal property on it, when he neither owns nor controls the personal property, unless the use amounts to a nuisance. *Ib.*

4. In an action against a village for injuries resulting from the negligence of its employee in piling tiles, parol evidence was admissible to prove that the defendant neither owned nor controlled them, although

they had been shipped to the defendant, and a bill of them had been rendered to it, and allowed by the president of its board of trustees. *Id.*

5. TOWN HOUSE, POWER TO BUILD. A town by force of the statute,—R. L. s. 2751,—which provides that a town may vote money for necessary incidental town expenses, may legally build a town house, and impose taxation therefor, for the accommodation of its meetings, for its municipal offices, and furnish the building with improved conveniences,—as heat by steam, and water; and if the primary purpose of the erection was for proper municipal uses, the town may rent a part of it for income. And it rests in the discretion of the voters, if exercised in good faith, to decide as to the expense of such building; and in so doing they may anticipate the prospective needs of the town. *Bates v. Bassett*, 530.

6. POWER TO REPAIR OLD BUILDING. It is the duty of a town to act with the discretion of a prudent owner in the care and management of its buildings; thus, it may lawfully repair an old building for rental purposes, although it would be illegal, if the primary object was to invest money in a building to rent. *Id.*

7. INCORPORATED VILLAGE, POWER OF, TO CONSTRUCT AQUEDUCT. When the legislature delegates to an incorporated village power, without limitation, to supply itself with water for fire and domestic uses, such power rests in the discretion of the voters of the village in respect to the amount of money to be expended on aqueducts and the supply of water, if exercised in good faith and for a proper municipal purpose. *Lucia v. Village of Montpelier*, 537.

8. And in such case, when a village has constructed one water main, it was held to be a question of expediency for the voters to decide whether another should be built; and an injunction was refused restraining the expenditure of money voted for that purpose, although the water in the existing main was used to some extent in running motors, and afforded a fair supply of water, if no accident befell it, and although some of the voters were influenced by a desire for an increase of motive power, but the concrete vote was given for the purpose of rendering the water supply more useful and certain. *Id.*

9. HIGHWAYS—COASTING. The plaintiff while traveling on a street in the defendant city was injured by a collision with a sled on which were several persons engaged in coasting. The city's charter conferred upon it authority over its streets, and compelled it to keep them in sufficient repair. Coasting was prohibited by an ordinance; but it was found that its practice, where and at the time the accident occurred, had been permitted to become a dangerous public nuisance, known to the mayor and the other officers, or which might have been so known, by the exercise of reasonable diligence; that it was also known to the greater part of the citizens and taxpayers, and approved of by them; that a majority of the board of aldermen expressly approved, though not by official action, of using the street for coasting, and that the minority did not object; *Held*, that the city was not liable, on the ground that, there being no express statutory liability, there was not an implied one, arising from the accept-

ance of the charter for injuries resulting from defective streets. *Weller v. Burlington*, 28.

NAVIGABLE LAKE. *See* EXCEPTION 1.

# NEGLIGENCE.

1. It is the duty of an agricultural society to render the place, where it holds a public exhibition, reasonably safe to all persons lawfully in attendance. *Selinas v. The Vermont State Agricultural Society*, 249.

2. QUESTIONS FOR JURY. It is a question of fact for the jury, whether an agricultural society is guilty of negligence in suffering during its exhibition a striking machine to be used on its grounds, with no guard around it, whereby the plaintiff was injured by a person, not an officer or a servant of the society, in the act of swinging a mallet to strike the machine, although the defendant had made a motion for a verdict on the plaintiff's testimony. *Id.*

3. It was also for the jury to decide whether the plaintiff's conduct was prudent or whether he was guilty of contributory negligence. *Id.*

4. ULTRA VIRES. This is not a case of *ultra vires*, although the machine was not placed there by the defendants and its use was foreign to the purposes of their organization; and there was no evidence that they had any interest in it, or that it was there by their permission or knowledge; but it was for the jury to decide, if it were not assumed that the machine was there by license, whether it had been so long upon the grounds that the defendants ought, in the exercise of reasonable care, to have known of its presence, and also whether it was dangerous. *Id.*

*See* BAILMENT; MUNICIPAL CORPORATIONS; ANIMALS; FENCE; RAILROAD.

NEGOTIABLE INSTRUMENTS. *See* BILLS AND NOTES.

# NEW TRIAL.

1. If the finding of the fact by the trier can be supported upon any rational view of the evidence it should stand; and a new trial will never be granted on the ground that the finding is merely against a preponderance of evidence; or on cumulative evidence, which would not be likely to make a substantial change in the results, and where no sufficient reason is assigned for its non-production at the first trial. *Thayer v. The Cen. Vt. R. R. Co.* 214.

2. The affidavits of jurors impeaching their verdict are not admissible in support of a petition for a new trial; and such petition also will be dismissed when there is pending on exceptions a motion for the same purpose. *Tarbell v. Tarbell*, 486.

*See* REFERENCE.

NOVATION. *See* LIMITATION, STATUTE OF, 3.

NUISANCE. *See* MUNICIPAL CORPORATION 4.

OATH. *See* TAXATION 2; CHATTEL MORTGAGE 3.

OFF-SET. *See* SET-OFF; EXECUTORS AND ADMINISTRATORS.

OFFICER. *See* SHERIFF; CRIMINAL LAW; ACTION ON THE CASE.

PARENT AND CHILD. *See* INFANT.

PARTIES. *See* TRUST COMPANY; MORTGAGE 1, 3.

#### PAUPER.

1. When a child's intellect has been so impaired by insanity that she is incapable of exercising any choice or intention in regard to her residence, she would not be emancipated on attaining her majority if she continued to reside in her father's family, and would take by derivation a settlement acquired subsequently by him. *Topsham v. Chelsea*, 219.

2. Until the contrary is conclusively shown, it is presumed that a pauper has sufficient intellect and intelligence to exercise a choice and intention in regard to her residence. *Ib.*

3. Where an insane child, after she has attained her majority, continues to reside in her father's family, and he subsequently acquires a settlement in another town, it is unnecessary to decide whether she was emancipated; for if she did not take the settlement of her father, she took one in her own right by a residence for more than seven years. *Ib.*

4. Insanity *per se*, occurring after a legal residence has commenced, and which, uninterrupted, would ripen into a legal settlement, does not, under the pauper law, suspend or hold in abeyance such residence, or affect the acquisition of a settlement, except so far as controlled by statute. *Topsham v. Williamstown*, 467.

5. While under the statute,—R. L. s. 2813,—the time spent by an insane person in a lunatic asylum is not computed in settlement cases, it is computed when he is not in an asylum, though he is under guardianship. *Ib.*

6. TRANSIENT PAUPER. In an action by one to recover of a town for keeping a pauper, it is error for the court, if the element of transiency is in the case, to charge the jury that the plaintiff could not recover for anything furnished the pauper after the defendant's overseer notified him that he would not pay therefor. One may be a transient pauper, although his disability is not caused by a sudden visitation of disease or accident. *Stone v. Glover*, 651.

PAYMENT, APPLICATION OF. *See* LIMITATIONS, STATUTE OF.

#### PENSION MONEY.

Under the U. S. Revised Statutes, s. 4747, and also the Revised Laws of this State, s. 1076, a debt created by the deposit of a pension check, with a bank, or of the money received from it, is attachable on trustee process. *Martin v. Hurlburt & Tr.* 364.

*See* PLEADING 6; JURY 2.

PENALTY. *See* PLEADING 7.

#### PLEADING.

1. When one sells property and agrees to accept in payment a note payable on time with security, and the buyer refuses to give the note and security, the seller can sue at once. *Foster & Jaquith v. Adams*, 392.

2. And in such case, where the seller requested the buyer to take the property and pay for it as agreed, and he refused to do so, no formal demand for the note and security was necessary. *Ib.*

3. **FRAUDS, STATUTE OF.** There may be an adjustment and recovery on what has been done under a contract which was within the Statute of Frauds. Thus, the plaintiff, on the defendant's request made by letter, purchased a farm for him, but retained the title in himself as security for the price, and the defendant occupied it as owner for several years, paying some of the interest and a part of the taxes, making repairs, and then abandoned the farm; *Held*, (a) that the defendant in effect was a mortgagor in possession, and that his abandonment operated as a foreclosure; (b) and that the plaintiff was entitled to recover the excess of the debt above the value of the premises. *Adams v. Cooty*, 395.

4. The farm was incumbered with mortgages which the plaintiff assumed when he purchased it; *Held*, that as fast as he made a payment on them he had a right to charge it to the defendant as made at his request. *Ib.*

5. A reservation in the deed from the original owner to the plaintiff for waste water does not relieve the defendant, although there was nothing in the letter authorizing the purchase as to it,—as his taking possession of the premises was a ratification. *Ib.*

6. **CORPORATION SERVICE—MOTION—PLEA IN ABATEMENT.** The defendant was sued as "the Burlington and Lamoille Railroad Company, a company organized under the laws of this State," etc. The service of the writ was like that required by the statute on a corporation, by leaving a copy with its clerk. A motion was filed to dismiss on the ground that the service was illegal; but it did not specify any error, or the method of correcting it. *Held*, (a) that, as there is a general law under which railroad corporations can be organized, it is presumed that the defendant is a corporation organized under this law; (b) that the motion—if the objection is available on motion—is faulty in not pointing out both the defect and its correction. *Nye v. Bur. & L. R. R. Co.* 585.

7. **PENALTY.** In an action upon the Act of 1882, No. 69, section 2, to recover the penalty and damages for failure to discharge a chattel mortgage, evidence was admissible to show the amount of usury in the mortgage note, as bearing on the question of payment of the note, and defendant's duty to discharge the mortgage. *Giffin v. Barr*, 599.

8. **DUPLICITY—EXCEPTION.**—In an action based upon section 2, No. 69, Acts of 1882, allowing for failure to discharge a chattel mortgage after performance of its condition, a recovery of "ten dollars for such neglect and all damages occasioned thereby," it is not necessary to declare in two counts, one for the penalty and the other for the damages; but a count including both, at most, would only be open to the fault of duplicity, which could only be taken advantage of by demurrer, and not by exception. *Ib.*

9. **DAMAGES.** Under the general allegation of "other damages," the plaintiff could recover only such as were the natural consequences of the defendant's refusal to discharge the mortgage; but he could not recover

for damages resulting from the defendant's false declarations as to the mortgage. *Ib.*

10. EXEMPLARY DAMAGES. As the action is based upon the statute, which limits the damages to \$10, and all damages occasioned by the neglect to discharge the mortgage, exemplary damages are not recoverable. *Ib.*

11. REMITTITUR. The jury were allowed to give exemplary damages; but the plaintiff was permitted to hold his judgment for the penalty, on condition that he remitted all above \$10. *Ib.*

12. COVENANT. In an action of covenant based on an indenture, where the declaration alleged that the plaintiff leased to the defendant the right to run a certain wood pulp grinder during the time a certain patent should be in force, and that the defendant was to pay as royalty twelve tons of pulp each year during the continuance of the agreement; that the pulp was to be poplar or spruce, and delivered at such places as might be designated by one R., provided that the freight did not exceed \$40 by the car-load; and that thirty-six tons of the royalty were unpaid; *Held*, on demurrer, (a) that the designation of the place of delivery was not an essential part of the consideration, and that a demurrer would not lie for want of an allegation that a place had been designated for delivery of the pulp; (b) that if R. failed to elect the kind of pulp, the selection fell on the defendant. *Cushman v. Somers*, 613.

13. EJECTMENT. One is liable in an action of ejectment for a projection of his roof over another's land. *Murphy v. Bolger*, 723.

See BILLS AND NOTES 4; COVENANT; CHANCERY; CRIMINAL LAW; AMENDMENT; REFERENCE; REPLEVIN; BAILMENT; RAILROAD; ACTION ON THE CASE; EJECTMENT; TROVER; CONTRACT.

#### PRACTICE.

1. EVIDENCE, GENERAL OBJECTION TO. A general objection to all the evidence relating to a land tax sale is not available as an objection to a certain paper. 79.

2. REMITTITUR. The court allowed the plaintiff to file a *remittitur*, certain articles having been by inadvertence included in the verdict, which were not taken by the defendant, and rendered judgment for the balance. *Crampton, assignee, v. Valido Marble Co.* 201.

3. REMITTITUR. In an action for breach of covenant where the verdict was larger than the plaintiff's claim in his specification, it is a proper case for the allowance of a *remittitur*. *Tarbell v. Tarbell*, 486.

4. But a *remittitur* should not be allowed, unless it clearly appears just what the excess in the verdict is; and the verdict should be set aside if it does not so appear. *Ib.*

5. The Supreme Court rendered judgment where the parties finally agreed as to the excess in the verdict, thereby increasing the *remittitur* allowed by the court below. *Ib.*

6. IMPROPER ANSWER OF WITNESS. Error cannot be predicated upon the improper answer given by a witness to a proper question; thus when the questions were pertinent to elicit evidence showing that a payment



had in fact been made as appeared by an indorsement, error cannot be predicted on an answer, even if it contravenes the statute,—R. L. s. 1002—which excludes a living party when the other party is dead. *Laurence v. Graves*, 657.

7. Error will not be found in an unanswered question put to a witness. 682.

8. EXCEPTION. An exception to the rendition of a judgment upon a special verdict does not reach back to a question, whether raised or not on trial, to which no exception was reserved, and which it is not necessary to determine in order to render a valid judgment. Thus, in such case it was held that whether the court erred in omitting to submit to the jury questions and instructions which ought to have been submitted was not open to review. *Goodenough v. Huff*, 53 Vt. 482, distinguished. *Farrant v. Bates*, 37.

9. COUNTER-CLAIM. A plaintiff who has made two parties defendants is in no situation to deny a counter-claim on the ground that it did not accrue to both and when he had always treated the deal as with both. *Drew v. Ellison*, 401.

See MOTION; PLEADING; CRIMINAL LAW; JURY; TRIAL OF CIVIL CAUSES; COUNTY COURT; NEW TRIAL; REFERENCE; CHANCERY; EVIDENCE; WILL 9; EXCEPTIONS.

PREScription. See WATER COURSE AND WATER RIGHTS 1.

#### PRESUMPTION.

It is presumed that the holder of a negotiable note is a *bona fide* holder; and when he produces it in court and proves its execution, he makes out a *prima facie* right of recovery, and is not bound to fortify his title to the note beyond the presumption, when the defence is an entire failure of consideration, and the defendant fails in such defence. *Blaney v. Pelton*, 275.

See PLEADING 6; JURY 2; MORTGAGE 9; EXECUTORS AND ADMINISTRATORS 4; INSURANCE 2, 7; SHERIFF 2; LIMITATIONS, STATUTE OF, 5.

PRINCIPAL AND AGENT. See AGENCY.

PRINCIPAL AND SURETY. See TAXATION 8; BILLS AND NOTES 7; EVIDENCE 9.

#### PROBATE COURT.

The jurisdiction of the Probate Court is exclusive in regard to all claims of an absolute or legal nature, when it has been once invoked for the settlement of an estate, and commissioners have been appointed thereon; thus, when a claim had been presented to commissioners by one of two joint contractors and there was an appeal, and it was ultimately decided that the suit could not be maintained on the ground of non-joinder of parties; *Held*, that the County Court had no jurisdiction of the same cause of action brought directly to that court against the administrators and after the commission on the estate had been closed. *Goff & Angus v. Robinson*, 633.

See GUARDIAN; EXECUTORS AND ADMINISTRATORS.

PROCESS. See SHERIFF; ATTACHMENT; CRIMINAL LAW; ACTION ON THE CASE; BAIL ON MESNE PROCESS; BAILMENT; RAILROAD 9.

PROMISSORY NOTE. *See* BILLS AND NOTES; WITNESS.

QUASH, MOTION TO. *See* CRIMINAL LAW 2.

QUESTIONS FOR JURY. *See* WATER COURSE AND WATER RIGHTS 6;  
INSURANCE; NEGLIGENCE.

### RAILROADS.

1. JURISDICTION. An action at law, based upon section 3383, Rev. Laws, can be maintained against the receiver of a railroad company for negligence in constructing a crossing, although leave was not obtained of the Court of Chancery to bring it. *Rosbury v. The Cen. Vt. R. R. Co.* 121.

2. CROSSING, LIABILITY OF RAILROAD TO TOWN. The railroad company, of which the defendant was receiver, being empowered under its charter to build its railroad across highways, provided it restored them as near as practicable to their former state and usefulness, to the acceptance of the selectmen, or in case of their refusal, to the acceptance of the commissioners, constructed its railroad across a highway in the plaintiff town, but neglected to restore it to its former usefulness, and left it defective through failure to put railings along the approaches constituting a part of the crossing. After the charter had been granted and the railroad built, a statute was passed, making railroad companies liable to towns for damages resulting from insufficient crossings. In an action to recover the amount of a judgment and the expenses attending it, which had been rendered against the plaintiff in favor of a traveller for injuries occasioned through want of said railings; *Held*, that the company failed in its primary duty; that its liability became established by the facts that it failed to restore the highway as the charter provided, and that the crossing had never been accepted; and if the approaches extended beyond the surveyed limits of the railroad and railings were required, it was the duty of the company to build them. *Ib.*

3. CHARTER-STATUTE. Although the charter was exempt from amendment and repeal, it was unnecessary to decide whether there was error in the charge to the jury, that the statute on which the action was based, was controlling; for the right of action upon the facts existed in any event; and a wrong reason for a correct decision is not reversible error. *Ib.*

4. DUTY OF RAILROAD IN BUILDING A CROSSING. The general rule is that where a railroad company is authorized to cross highways, it is under a duty to construct its road across them in a reasonable manner with reference to the double use of crossing for its own purpose, and for travellers, and that the right is subject to the maxim, *Sic utere tuo ut alienum non lœdas*. *Ib.*

5. STATUTE OF LIMITATIONS. The defendant cannot protect itself against the liability on the ground that the Statute of Limitations would bar an action for the original obstruction; for the obligation and the negligence were continuing. *Ib.*

6. CROSSING. The word "crossing," as used in the statute and applied to the intersection of a highway and a railroad, means the entire

structure, including the approaches, although a part may be outside the limits of the railroad lands. *Ib.*

7. **ESTOPPEL.** The doctrine of estoppel does not apply; as it does not appear that the railroad company was misled in reliance upon the action of the town, or knew what the town did in making repairs on the approaches. *Ib.*

8. **PRACTICE. WAIVER.** The Supreme Court cannot find or infer a waiver of acceptance of the crossing, from the slight repairs made by the town on the travelled track of the fill, when the jury found that neither the selectmen nor commissioners accepted it. *Ib.*

9. **ENGINEER. ARREST OF, ON TRAIN.** An officer having a writ by which he is commanded to arrest the body of the defendant, a railroad engineer, may lawfully stop a train of cars run by such engineer, for the purpose of making the arrest. *St. Johnsbury & L. C. R. R. Co. v. Hunt*, 588.

10. **MUST FURNISH REASONABLY SAFE PASSAGE TO AND FROM MAIL TRAINS.** It is the duty of a railroad company, which carries the mail under a contract with the government of the United States, and by whose regulations postal clerks on mail trains are required to receive at the cars stamped letters and sell stamps, to furnish a reasonably safe passage to and from its mail trains, while stopping at its regular stations, for the purpose of mailing letters; and a failure to provide such passage is actionable negligence. *Hale v. Grand Trunk R. R. Co.* 605.

*See* PLEADING 6

**RATIFICATION.** *See* FRAUDS, STATUTE OF: 3; INFANT.

**RECEIVER.** *See* RAILROAD: TRUST COMPANY.

**RECOGNIZANCE.** *See* BAIL.

**REMITTITUR.** *See* PLEADING 11; PRACTICE; COVENANT 13.

**RESERVATION.** *See* FRAUDS, STATUTE OF: DEED 2.

#### REFERENCE.

1. A motion made in the County Court to re-commit a referee's report on the ground that he erred in finding facts, is addressed to the discretion of the court; and its decision thereon is not revisable, where the case shows that the referee had some evidence properly before him to sustain his findings. *Thayer v. The Cen. Vt. R. R. Co.* 214.

2. A cause will not be remanded for the referee to revise his findings as to a certain point, on the ground that it was not regarded as very important by counsel, nor given much prominence on trial, when it appears from the papers and briefs that the point was brought to the attention of the referee by both sides, and discussed in the court below, as it would amount to granting a new trial. *Palmer v. St. Albans, Village of.* 427.

*See* COURT, COUNTY; AMENDMENT 2.

#### REPLEVIN.

1. In a replevin suit, where the writ alleges the title to the property to be in the plaintiff, a trial upon the merits determines the ownership; and the plaintiff acquires no title or right to sell the property by filing a bond

in accordance with the statute; thus, when during the pendency of a replevin suit, the plaintiff's agent sold the horse replevied and gave his personal warranty of title, and the suit resulted in a judgment for a return of the property, *it was held*, in an action for a breach of warranty, that evidence was admissible to show the above facts; and that the purchaser was entitled to recover. *Furnham v. Chapman*, 338.

2. A right to the possession of property is sufficient to maintain replevin against one who has neither title nor such right; thus, where either the plaintiff's wife was the owner, or her father's estate was, whose administrator told the plaintiff husband to take it for his wife, they can maintain replevin against one without title or right of possession. *Timmors v. Labounty*, 624.

3. GIFT. And in such case, it is not necessary to decide where there was a valid gift of the property from the father. *Ib.*

4. A joint owner of personal property can maintain replevin in his own name to recover it, against one whose right to it is not superior to his. *Chaffee v. Harrington*, 718.

See CHATTEL MORTGAGE 3, 7.

RIPARIAN RIGHTS. See EXCEPTIONS: WATER COURSE AND WATER RIGHTS.

#### SALE.

1. When one sells property and agrees to accept in payment a note payable on time with security, and the buyer refuses to give the note and security, the seller can sue at once. *Foster & Jaquith v. Adams*, 392.

2. And in such case, where the seller requested the buyer to take the property and pay for it as agreed, and he refused to do so, no formal demand for the note and security was necessary. *Ib.*

3. WARRANTY—DECLARATIONS. In the sale of an engine and boiler, the vendor's declarations as to their quality constitute a warranty that they are as described, when the declarations are relied on by the buyer as the basis of the contract, and the vendor so understands it. *Dree v. Ellison*, 401.

4. LATENT DEFECT. A defect in a steam chest, readily discernible on taking off the cover, is not a latent defect. *Ib.*

5. OFFSET. The plaintiff sold an engine and boiler with the fittings to the defendants and received the pay therefor; and when the plaintiffs learned that there was difficulty with the governor, they made a proposition to furnish another and take back the old one at a difference of \$45, which offer was accepted without condition; *Held*, in an action to recover the \$45, where the defendants were allowed damages under a plea in offset for defects in the engine, that plaintiffs were entitled to recover the \$45 on the ground that the acceptance was according to the terms of the offer. *Ib.*

6. A plaintiff who has made two parties defendants is in no situation to deny a counter-claim on the ground that it did not accrue to both and when he had always treated the deal as with both. *Ib.*

7. **DECEIT—REPRESENTATIONS.** When one sells hay for *good hay*, and its quality cannot be ascertained by ordinary examination because the hay was baled, if it is defective he is liable for the difference between the value of the hay as it was and as it was represented; and the price for which the vendee sells the hay has no relation to the rights of the parties, except as to the value of the hay. *Brock v. Clark*, 551.

8. The defendant executed his negotiable note in part payment for a printing press, and, having used it for several months in the precise kind of work for which it was purchased, he exchanged it for another machine, realizing for the press more than he was to pay for it. He only complained that it would not do the work so well and so advantageously as the vendor represented; *Held*, that the defendant's claim came far short of the defence of an entire failure of consideration. *Blaney v. Pelton*, 275.

**SCIRE FACIAS.** See **BAIL ON MESNE PROCESS.**

**SELECTMEN.** See **RAILROAD; TOWNS.**

# SET-OFF.

Under the statute.—R. L. s. 2127,—in an action against the estate of the deceased person, claims in offset are limited to such as existed at the time of the death of the intestate; otherwise, the due course of distribution would be altered. *Hatch v. Hatch's Est.* 160.

See **SALE 5; INFANT 3.**

# SHERIFF.

1. Under the statute.—R. L. s. 858,—which provides that the sheriff may depute any proper person to serve a writ, or other precept, by indorsing thereon a special deputation, the deputation may be written on a separate piece of paper and attached to the back of the process by the sheriff, or, in certain circumstances, he may authorize another to attach it for him. *Conderdy v. Johnson*, 595.

2. It is not necessary that the deputation should state that the deputy is a "proper person;" it is presumed that he is such. *Id.*

3. The court give no countenance to the practice of putting deputations into the hands of a special deputy for him to use as he may have occasion on processes not coming within the cognizance of the sheriff. *Id.*

4. The fact that an officer having charge of the jury in a case in which he was a witness, was present during their deliberations after it had been submitted to them, is not sufficient cause for setting aside a verdict although it was an impropriety, and another officer ought to have been selected. *State v. Flint*, 304.

See **ATTACHMENT; CRIMINAL LAW: ACTION ON THE CASE: RAILROAD 9.**

**SPECIFIC PERFORMANCE.** See **FRAUDS, STATUTE OF.**

# STATUTE.

The Constitution does not require the governor to sign a bill at its end in order that it may become a law; it is sufficient if he approves it and signs it in any place intentionally and understandingly; thus, when he signed a

bill at the end of the second section, and on discovering his mistake erased his name and failed to subscribe the bill until after the time for signing bills had elapsed, it was held to be a valid law. *Nat. Land & Loan Co. v. Mead*, 257.

#### STATUTES CONSTRUED AND LIMITED.

Rev. Statutes, U. S. Pension, Trustee Process, 364.

1. R. L. ss. 773, 3556, Appeal in Court of Chancery, 10, 11.
2. R. L. s. 942, Bonds chancered, 73.
3. R. L. s. 1469, Principal committed for want of Bail, 71.
4. R. L. s. 1468, Delivering Principal into Court, 71.
5. Comp. Laws, chap. 90, Sale of Land for Taxes, 86.
6. R. L. s. 4241, Offenses against Chastity, 92.
7. R. L. s. 3383, Railroad, Crossing, Highway, 121.
8. Act of 1884, No. 111, Grand Juror, 142.
9. R. L. s. 2127, Offset, 160.
10. R. L. s. 819, Powers of Clerk of County Court, 176.
11. R. L. s. 1459, Commitment to Jail, 176.
12. R. L. s. 1673, Appeal in Criminal Case, 199.
13. R. L. s. 1653, Respondent, Challenging Juror, 228.
14. R. L. ss. 1860, 1966, Insolvent Law, Chattel Mortgage, 267.
15. R. L. s. 1860, Insolvent Law, 291, 563.
16. R. L. s. 1321, Justice Ejectment Act, 325.
17. R. L. s. 441, Collector of Tax, 330.
18. R. L. s. 2693, Selectmen, Tax-bills, 330.
19. R. L. s. 1230, Replevin of Goods, 338.
20. Act of 1882, Nos. 2 & 17, Taxation, 351.
21. R. L. s. 1067, Trustee Process, 364.
22. R. L. s. 2291, New Trustee appointed, 378.
23. R. L. s. 1932, Tenancy at Will, 386.
24. R. L. s. 2065, County Court, Administrator, 224.
25. R. L. s. 2278, Appeal from Probate Court, 224.
26. R. L. s. 1894, Homestead Act, 420.
27. R. L. s. 1004, Book Account, Party, Witness, 440.
28. R. L. s. 2813, Pauper, Lunatic, 467.
29. R. L. ss. 1955, 4155, Fraudulent Conveyance, 478.
30. R. L. s. 1894, Homestead, 495, 546.
31. R. L. ss. 3610, 3618, Foreign Ins. Co. 515.
32. R. L. s. 3184, Fence, 554.
33. R. L. s. 1451, Costs, 558.
34. R. L. s. 2751, Towns may vote money, when, 530.

35. R. L. s. 1965, Chattel Mortgage, 578.
36. R. L. s. 1068, Trustee Process, 581.
37. R. L. s. 858, Sheriff-Deputation, 595.
38. Act of 1882, No. 69, Chattel Mortgage, 599.
39. R. L. chap. 70, Partition of Real Estate, 631.
40. R. L. s. 1908, Homestead, 627.
41. R. L. s. 973, Statute of Limitations, 633.
42. R. L. s. 2125, Settlement of Estates, 633.
43. R. L. ss. 281, 326, 376, Act of 1882, No. 11, Taxation, 644.
44. R. L. s. 1002, Witness, 655, 657.
45. R. L. s. 1247, Ejectment, 727.
46. R. L. s. 4053, Estrays, 712.

SUPPORT, FUTURE. *See* MORTGAGE 4.

SURETY. *See* BILLS AND NOTES 7; TAXATION 8.

#### TAXATION.

1. SALE OF LAND FOR TAXES—TENANTS IN COMMON—TRESPASS. When a town was originally laid out into lots, and all except eight of them were allotted to individual proprietors, and they owned the remainder in common, those who have succeeded to their rights are tenants in common of the lands which were unappropriated; and one of such owners cannot maintain trespass *quare clausum* or trover against his co-tenant for entering upon and removing timber from such lands. *Kane's Administrator v. Garfield*, 79.

2. TAX SALE—COMP. LAWS, CHAP. 90—EVIDENCE. The legislature assessed a tax on the lands in a town for highways and appointed a collector and also a committee to expend the tax. The committee expended the tax; and their account was made out and sworn to before a justice of the peace, and then presented to the judges of the County Court, who after examination allowed it. It appeared from the report made by the judges that they found by the oaths of the committee that they had faithfully expended the tax. The statute (Comp. Laws, chap. 90, s. 3) provided that no account should be allowed unless verified by the oath of one or more of the committee; but no form of oath was prescribed. A portion of the unappropriated land incident to the ownership of lot No. 20, which had been allotted, was sold to satisfy the tax: and the question being as to the validity of the sale: *Held*, that, while the statute, which prescribes the sales of land for taxes, is to be strictly, and perhaps literally followed, it is to receive a reasonable construction; and where no particular form of doing a thing is pointed out, any mode which effects the object with reasonable certainty is sufficient; and that the presumption is that the committee took such an oath as was required by law: and it also appears from the finding of the judges that the account was properly verified. *Ib.*

3. NOTICE. The committee filed the original account with the clerk of the court instead of a certified copy, as required by the statute; *Held*, that

the purpose of the statute was fully answered, in that it is presumed that the account remained on file, and notice of its nature was thereby given to all interested. *Ib.*

4. EVIDENCE. GENERAL OBJECTION TO NOT SUFFICIENT. A general objection made to a referee to all the evidence relating to a land tax sale is not available as an objection to a certain paper, which, if admissible, tended to prove that the committee gave the required notice of their intention of presenting their account to the court for allowance. *Ib.*

5. REPORT OF JUDGES CONCLUSIVE. But, the report made by the judges, stating that it appeared from evidence before them that the required notices had been given, is conclusive. *Ib.*

6. COLLECTOR'S BOND. The amount of the tax and not the amount of the account which might be allowed, determines how large the collector's bond should be. *Ib.*

7. COLLECTOR. On the facts reported, there was no error in the proceeding of the collector; or in the notice given to the land owners, that they might work out their taxes. *Ib.*

8. COLLECTOR'S BONDSMEN. The relation of a tax collector's bondsmen to the town is that of sureties; and they are not to be held beyond the precise terms of their contract. *Ferrisburg v. Martin*, 330.

9. When a tax collector makes a payment of taxes collected, and fails to state how they should be applied, and when the treasurer also fails to notify the bondsmen that no application has been made, as provided by statute,—R. L. s. 441,—an arbitrary application made by the treasurer is not conclusive. Money collected and paid to the treasurer when the bondsmen were sureties should be applied in extinguishment of their liability, unless they consented to a different application. *Ib.*

10. To determine the liability of the bondsmen it is necessary to ascertain what tax bills were delivered to the collector during the time named in the bonds, the amount collected and when collected, and the amount paid to the town treasurer and when paid; and where these facts are not found by the referee the case will be re-committed. *Ib.*

11. It is not a breach of official duty on the part of a collector to neglect to account for uncollected tax bills where no warrants were annexed to them. *Ib.*

12. LIST. A list is not legal which is not signed by a majority of the listers. *Ib.*

13. PRACTICE. In an action of replevin, where the verdict was for the defendant, if there was error in excluding evidence relating to damages, it is not available to the plaintiff. *Fulham v. Hove*, 351.

14. EVIDENCE—PUBLIC DOCUMENTS—UNITED STATES CENSUS. The Compendium of the tenth Census, a book compiled pursuant to an Act of Congress, and printed at the government printing office, is admissible to show the population of the town when it is a material fact. *Ib.*

15. TAXATION—LISTERS—JUDICIAL ACTION. The action of listers is judicial under the Act of 1882, No. 2, s. 17, when, after doubling the



amount obtained, they make a further assessment of a sum "which will, in their judgment," make up the amount of the taxpayer's taxable property; and in an action of replevin to recover goods taken by a collector in satisfaction of a tax, evidence is not admissible to attack the assessment of the listers by showing that they had no facts on which to base it. *Ib.*

16. EVIDENCE. The inventory and affidavit used by the plaintiff before the listers were not admissible in his favor. *Ib.*

17. EVIDENCE—INTENTION—RESIDENCE. Evidence as to one's intention to engage in business in a particular place is not admissible to show his intention as to making that the place of his legal residence. *Ib.*

18. EVIDENCE—RESIDENCE. In an action against a tax collector, where it is material to show the plaintiff's residence, evidence is admissible to prove that he registered and voted in another state the same year of the assessment complained of, if coupled with an offer to prove that the laws of such state required a residence there of one year before voting. *Ib.*

19. The court will pass upon an exception as it stands, though apprehensive that by inadvertence it does not present the question just as it came up in the court below. *Ib.*

20. Evidence is not admissible to show what measures the plaintiff took after the first of April, and without success, to have his name put on the New York City Directory. *Ib.*

21. The question being whether the plaintiff's domicile was in New York or in this State, there was no error in compelling him, on cross-examination, to state whether he paid any taxes in New York. *Ib.*

22. DOUBLING CLAUSE OF TAX LAW. The defendant having failed to return a satisfactory inventory of his taxable property, there was no error in the action of the listers, under the statute,—R. L. s. 326,—in assessing him for money and debts and then taking the appraisal of his real estate in the preceding year, and doubling both items for his grand list. *Bartlett v. Wilson*, 644.

23. EVIDENCE—INVENTORY. In an action by a collector to recover a tax by trustee process under the statute,—R. L. s. 407,—the court having held that it was incumbent on the plaintiff to show that at the date of the writ the defendant had no known personal property in the State sufficient to pay the tax, it cannot be said that it was error to admit, for the purpose of proving such fact, an inventory made by the defendant in the town attempting to enforce the tax, and sworn to by him a few months prior to such date, and which included no personal property, although there was no evidence that the defendant was a resident of such town at that time. *Ib.*

24. LEASED PROPERTY CANNOT BE DISTRAINED. But evidence was not admissible in behalf of the defendant which tended to show that he owned property subject to a lease: for such property cannot be distrained for taxes. *Ib.*

*See* TOWNS; MUNICIPAL CORPORATION.

#### TEXANCY IN COMMON.

In cases of homesteads, before they are set out, the parties owning the

premises, including the homestead, are not, strictly speaking, tenants in common of the premises, although they are often termed such. *Lindsey v. Austin*, 627.

See TRESPASS.

#### TOWNS.

1. A town by force of the statute,—R. L. s. 2751,—which provides that a town may vote money for necessary incidental town expenses, may legally build a town house, and impose taxation therefor, for the accommodation of its meetings, for its municipal offices, and furnish the building with improved conveniences,—as heat by steam and water; and if the primary purpose of the erection was for proper municipal uses, the town may rent a part of it for income. And it rests in the discretion of the voters, if exercised in good faith, to decide as to the expense of such building; and in so doing they may anticipate the prospective needs of the town. *Bates v. Bassett*, 530.

2. It is the duty of a town to act with the discretion of a prudent owner in the care and management of its buildings; thus it may lawfully repair an old building for rental purposes, although it would be illegal, if the primary object was to invest money in a building to rent. *Id.*

See TAXATION; RAILROAD; MUNICIPAL CORPORATION.

#### TRESPASS.

TENANTS IN COMMON. When a town was originally laid out into lots, and all except eight of them were allotted to individual proprietors, and they owned the remainder in common, those who have succeeded to their rights are tenants in common of the lands which were unappropriated: and one of such owners cannot maintain trespass *quare clausum* or trover against his co-tenant for entering upon and removing timber from such lands. *Kane's Administrator v. Garfield*, 79.

#### TRIAL OF CIVIL ACTIONS.

1. EVIDENCE, GENERAL OBJECTION TO NOT SUFFICIENT. A general objection made to a referee to all the evidence relating to a land tax sale is not available as an objection to a certain paper, which, if admissible, tended to prove that the committee gave the required notice of their intention of presenting their account to the court for allowance. *Kane's Adm'r v. Garfield*, 79.

2. PRACTICE—STAYING EXECUTION. And, if in such case the grantor is liable to two actions,—one in favor of his grantee for a breach of the covenant of seisin, and another to his grantee's assignee upon that of warranty, the court can protect his rights by attaching conditions to the judgment, or staying execution. *Tillotson v. Prichard*, 94.

3. SUPREME COURT—WAIVER—PRACTICE. The Supreme Court cannot find or infer a waiver of acceptance of the crossing, from the slight repairs made by the town on the traveled track of the fill, when the jury found that neither the selectmen nor commissioners accepted it. *Roxbury v. The Cen. Tr. R. Co.*, 121.

4. **PRIMA FACIE CASE**—NOTE. It is presumed that the holder of a negotiable note is a *bona fide* holder; and when he produces it in court and proves its execution, he makes out a *prima facie* right of recovery, and is not bound to fortify his title to the note beyond the presumption, when the defence is an entire failure of consideration, and the defendant fails in such defence. *Blaney v. Pelton*, 275.

5. **WITNESS**—CROSS-EXAMINATION. The question being whether the plaintiff's domicile was in New York or in this State, there was no error in compelling him, on cross-examination, to state whether he paid any taxes in New York. *Fulham v. Howe*, 351.

6. **COUNTER-CLAIM**. A plaintiff who has made two parties defendants is in no situation to deny a counter-claim on the ground that it did not accrue to both and when he had always treated the deal as with both. *Drew v. Ellison*, 401.

See PRACTICE; CHANCERY; CRIMINAL LAW; JURY; EXECUTORS AND ADMINISTRATORS; MOTION.

#### TROVER.

1. In an action of trover for the conversion of several articles where the plaintiff failed to recover all that he sued for, the defendant is not entitled under the statute.—R. L. s. 1451,—to an apportionment of the costs; as only a single issue was made by the pleadings. But in such case the court below denied the plaintiff costs as to claims which he failed to establish, and the judgment was affirmed. *Ross v. White*, 558.

2. In an action on the case for negligence against the bailee of a horse for hire, the burden is on the plaintiff throughout the trial to prove negligence; and it is not shifted by merely showing that the horse was sound when delivered to the bailee, and when returned, that it was injured in a way that does not ordinarily occur without negligence. *Malaney & Blakey v. Taft*, 571.

3. The rule that prevails in an action of trover as to the liability of a bailee, who violates the contract of bailment, does not apply in an action on the case for negligence. Thus, in an action for immoderate driving and improper care of the plaintiffs' horse where his evidence tended to show that the defendant drove a greater distance than he engaged for, and that the horse was sound when taken by the defendant, but injured when returned, *it was held*, that there was no error in the charge of the court, that the gist of the action was negligence, and that there could be no recovery, unless the jury found that the horse was injured by improper use, care, or driving. *Id.*

See CHATTEL MORTGAGE; EVIDENCE 17; BAILMENT.

#### TRUSTEE PROCESS.

1. Under the U. S. Revised Statutes, s. 4747, and also the Revised Laws of this State, s. 1076, a debt created by the deposit of a pension check with a bank, or of the money received from it, is attachable on trustee process. *Martin v. Hurlburt & Tr.* 364.

2. Money in the possession of the clerk of the County Court, paid to him under a decree of the Court of Chancery, is attachable on trustee process, when the purpose of the legal custody has been accomplished, and the only duty of the clerk is to pay the money to the defendant. *Wether v. Flannery*, 581.

#### TRUST COMPANY.

1. The inspector of finance obtained an injunction against an insolvent trust company, restraining it from transacting further business, and also the appointment of a receiver, who was ordered to take possession of the property and administer it according to law. The receiver preferred his petition, praying for the direction of the court as to the distribution of the funds, with reference to one section of the charter, which gave a preference to the debts of minors, insane persons, and married women, in "case of the dissolution of said company by act of law or otherwise." There were more than 2,400 depositors, and more than 1,100 claimed a preference. Notice of the hearing on the petition was given by publication three weeks successively in a newspaper, and by acceptance of service by the chairman of the depositors' committee. The receiver and counsel for the general creditors, and also counsel for those who claimed a preference, appeared; and after a full hearing it was decreed that there should be an equal distribution of the funds, on the ground that insolvency did not work a dissolution of the corporation. An appeal was taken on behalf of eight married women and four minors, some of whom intervene in this proceeding; and the decree below was affirmed. On a petition brought a little more than a year after the first one, for the purpose of obtaining a preference; *Held*, that, although the general rule is that all persons interested in the litigation should be before the court, this case is within the exception that, where the parties are so numerous as to make it impracticable or greatly inconvenient and expensive, it is sufficient, if such number be joined as will fairly represent the interest of all; and that, as both classes of depositors were fairly represented in the litigation, all of them were bound by the decree. *Decree, Inspector of Finance, v. The St. Albans Trust Co.*, 1.

2. That, as the doctrine of estoppel by judgment is not applicable to a case ambulatory in its nature, the decree does not preclude all future inquiry into the matter; but, in determining whether a dissolution is now shown, the inquiry must be confined to what transpired at a time between the institution of the two proceedings. Relief cannot be granted on what existed before the first decree; and it is not sufficient to show a present state of things adequate to relief. *Ib.*

3. That most of the things alleged in the petition are found by the master to exist at the present time; but it does not appear when those things transpired, except the depreciation of assets, which was large during the last two years; but this does not entitle the petitioners to be heard on the merits; for insolvency, however hopeless, is not sufficient evidence of the surrender of corporate rights. *Ib.*

4. The Supreme Court will look into the whole record of the former

adjudication in this case to see what has been done; and, having been set up in the answer, it is available, though not put in evidence; especially as the petition expressly made the prior proceedings a part of itself, but omitted to set them out, to avoid prolixity. *Ib.*

5. The receiver, in point of fact, represented in court the general creditors, rather than those claiming a preference. *Ib.*

# TRUST.

A voluntary settlement, fully completed, cannot be annulled by the settlor, when it has been fairly made with knowledge of its effect, and no power of revocation is reserved; thus, the owner of real estate conveyed it to the defendant who executed a mortgage back, conditioned for the maintenance of the mortgagee and his wife, and for the payment of \$1,000 within a reasonable time after their death, to each of their three children, if they survived their parents, and if they did not, then to the heirs of the deceased child. One of the three children having deceased, leaving two heirs, the mortgagor and mortgagee entered into a new agreement, by which these heirs were to receive less than they were entitled to under the mortgage; *Held*, that the effect was to create a trust in the grantee of the real estate, and to vest in each of the children of the settlor a right to the sum of \$1,000, of which they could not be divested without their consent; and that the new agreement was inoperative and void. *Sargent v. Baldwin*, 17.

ULTRA VIRES. *See* AGRICULTURAL SOCIETY.

UNDUE INFLUENCE. *See* CHANCERY: WILL 9.

# USURY.

1. In 1873 the plaintiff executed a mortgage on his farm to secure his note given to the defendant for \$1,000 payable in five years with interest; and upon receipt of the note and mortgage the defendant counted out to the plaintiff \$1,000, and then took from the sum \$100, being the usury agreed upon. The note was paid in 1879 by one who had purchased the premises and assumed its payment as a part of the purchase; *Held*, that the counting out the \$1,000 was a mere device; that the \$100 entered into and became a part of the note; that the payments made by the plaintiff and those by the purchaser were to be applied in liquidation of the legal portion of the debt; and as the suit was commenced within six years from the payment of the note, the Statute of Limitations was not a bar. *Harvey v. Nat. Life Ins. Co.* 209.

2. But an overcharge of \$12 for examining the property offered as security was not usury; and the money thus paid was due when the examination was completed, and the Statute of Limitation began to run upon it. *Ib.*

VENDORS AND PURCHASERS. *See* SALE.

VERDICT. *See* PRACTICE: JURY.

VILLAGE, INCORPORATED. *See* MUNICIPAL CORPORATION.

VOLUNTARY SETTLEMENT. *See* MORTGAGE 1, 4.

WAIVER. *See* RAILROAD 8; INSURANCE 9.

WARD. *See* GUARDIAN.

WARRANTY. *See* SALE; INSURANCE; COVENANT.

### WATER COURSE AND WATER RIGHTS.

1. A prescriptive right is as perfect, and has the same validity and force as one acquired by grant; and its owner cannot be divested of it by his words or acknowledgment. *Weed v. Kneenan*, 74.

2. In an action for flowing the plaintiff's land, the defendant claimed a prescriptive right; and it appeared that several years after the permanent structure of his dam had been built, he used a flash-board on it for the purpose of storing water; that the plaintiff's evidence tended to prove that defendant within fifteen years asked a former owner of the land for a license to raise a dam; that one question was whether the conversation as to the license related to the main dam or the flash-board; that the court instructed the jury that, if it related to the dam, and that if the defendant had gained a prescriptive right as to this, he could not be divested of it by what he might say, but if it related to the flash-board, which was first put on only thirteen years before, that it was an acknowledgment of the superior right of the owner of the servient estate and would rebut the presumption of a grant; that the jury returned a verdict for the plaintiff; and, on inquiry by the court, stated that the damages were given in consequence of the flash-board; *Held*, that the result was logical and the verdict valid. *Ib.*

3. ALLUVION. When alluvion is formed on lands bordering on an un-navigable river, owned by contemninous proprietors, the rule for distribution of the accretions is to extend the side lines of each owner to the nearest river bank, giving to each the alluvial deposits in front of his own land, especially if equitable. *Hubbard v. Manwell*, 235.

4. FLOODING ANOTHER'S LAND—DAMAGES. In an action against a marble company for depositing sand in a stream whereby a sand bar was formed and the plaintiff's land was flooded, he is entitled to recover for all injuries to his crops and land, which were occasioned by the defendant's unlawful acts committed before the commencement of the suit, including the effects of such acts, which became apparent subsequent to the commencement. *Goodrich v. Dorset Marble Co.* 280.

5. EVIDENCE. Evidence is admissible to prove the full effect of the unlawful flooding of lands, although it tends to show some injury caused by acts committed after the commencement of the suit. *Ib.*

6. QUESTION FOR JURY. It was for the jury to decide as a question of fact, whether the sand-bar formed by the defendant's deposition of sand in the stream obstructed the water. *Ib.*

7. DRAIN OBSTRUCTION—DAMAGES. It is the duty of one injured in his estate by the fault of another to use all reasonable means to protect himself against injurious consequences; thus the defendant obstructed the plaintiff's drain, and the plaintiff could have indemnified himself for \$25 but by delaying to repair, the damages amounted to \$100; *Held*, that the legal measure of damages was \$25. *Lloyd v. Lloyd*, 288.

WIDOWS. *See* HOMESTEAD; INFANT.

## WILL.

1. CONSTRUCTION OF. The will contained the following clause: "I give and devise the residue of my estate, both real and personal, in equal shares to my four sisters, Catherine and Calista Shepard and Betsey Martin and Flavilla Batchelder, to them and their children forever, with this condition, that if either of my said sisters should die, leaving no children, then her share as aforesaid to the other sisters living, in equal shares." The will was made in 1850, and the testator died in 1867. One sister died in 1864, leaving a daughter, who has since deceased, leaving three children; another sister died in 1878, leaving no children; another in 1882, leaving children; and the last in 1883, leaving no children; *Held*, that the sisters took only a life estate with remainder in their surviving children; and that the shares of the two sisters, who died without children, should be divided equally, *per stripes*, between the grandchildren of one sister and the children of the other sister. *Shepard's Heirs v. Shepard's Estate*, 109.

2. LATENT AMBIGUITY. There is no latent ambiguity in the will which would permit the admission of testimony to show enmity between the testator and his brother. *Id.*

3. In construing a will effect should be given to every clause, and proper force to every word. *Id.*

4. ALL WORDS CONSIDERED—GENERAL WORDS. Except in residuary clauses, general words in a will following words of a limited signification, and coupled with them, are restricted to the same class of things as the former; thus, the testatrix gave by will to her uncle her "home place on Prospect street, in said Burlington, with my household furniture, and all my personal goods and chattels on said premises at the time of my decease," and the greater part of the residue of her estate to a hospital; *Held*, that the words "goods and chattels" did not include promissory notes and cash which were in the house or "home place" of the testatrix at the time of her death. *Peaslee v. Fletcher's Estate*, 188.

5. WILL AND CODICIL ONE INSTRUMENT. A will and codicil form one instrument and are to be construed together; thus, an additional bequest in a codicil is subject to the conditions of a clause of survivorship in the will to the same legatee, where no repugnancy is created by such a construction. *Thompson's Administrator v. Churchill's Estate*, 371.

6. POWERS MAY BE EXERCISED BY TRUSTEE'S HEIRS. Discretionary powers given to a trustee in a will, and also expressly given to *his heirs*, may, after his decease, be exercised by his heirs. *Williams v. Moliere*, 378.

7. In such case all the heirs should be appointed trustees. *Id.*

8. PUBLICATION OF WILL. It is a sufficient publication of a will where the testatrix and the witnesses severally signed it in the presence of each other, although the testatrix did not personally say that it was her will, but the person who drew it for her announced to the witnesses in her presence that it was, and requested them to sign it as witnesses. *Denney v. Pinney's Heirs*, 524.

9. WITNESSES—DEPOSITION. When one of three attesting witnesses to

a will has deceased, and another was present in court and testified to the signing, it was not incumbent on the proponent to produce the other, who resided in another state and not within reach of process, nor to take his deposition, though he was in this State for a few days during the pendency of the cause. *Ib.*

10. **UNDUE INFLUENCE—BURDEN OF PROOF—PRACTICE.** In an action to establish a will the contestant pleaded mental incapacity and undue influence, and the proponent introduced evidence, in the opening, bearing on both points, to prove capacity: the contestant put in evidence to show that the testatrix was weak in body and mind to sustain his plea of undue influence, and the proponent offered in rebuttal evidence relating to the health and activity of the testatrix and her ability to labor; *Held*, that, the burden being on the proponent to prove the capacity of the testatrix, but on the contestant to prove undue influence, the evidence, though cumulative as to one issue, was rebutting as to the other, and admissible. *Ib.*

11. **CONSTRUCTION OF—REPUGNANCY.** The following words in a will, "I give and bequeath the residue of my estate to my said granddaughter \* \* \* to be for the proper use and benefit of herself and heirs forever," convey an absolute estate, if used without limitation, and have the same effect as a grant in a deed to one and his heirs forever. *Chaplin v. Doty*, 712.

12. It is an elementary rule in the construction of wills, that an absolute gift will not be defeated by a subsequent repugnant clause, unless such clause is plainly a qualification or condition, evidently intended by the testator to be read as a part of the preceding clause. *Ib.*

13. The will gave an absolute estate to the testator's granddaughter, and there was added the following: "But if she shall not marry, or marrying shall have no issue living, then I give and bequeath to her the interest," etc.; and also the following: "But if my granddaughter shall die without lawful issue living, then I give and bequeath whatever may remain," etc., to other persons named. The legatee is married and has lawful issue. On a bill brought to obtain a construction of the will; *Held*, that the absolute gift was not qualified, as the events named did not happen; that the words "shall die without lawful issue living," mean "without having *had* lawful issue;" and that the granddaughter was entitled to the residue of the estate. *Ib.*

*See* EXECUTORS AND ADMINISTRATORS.

#### WITNESS.

Where a surety on a promissory note has paid it, in an action by him against the estate of a deceased surety on the same note, to recover the amount so paid, the maker is a witness under the statute,—R. L. s. 1002,—to prove that the plaintiff was not a co-surety, but only a surety for the deceased. *Cunfield v. Bennett's Estate*, 655.

*See* EVIDENCE 15.

**WRIT.** *See* SHERIFF; ATTACHMENT; ACTION ON THE CASE.

*See: J. G. ~*



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